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ABSTRACT

This booklet provides a transcript of the September 16, 1997 hearing before the Committee on Commerce, Science, and Transportation of the U.S. Senate. The hearing concerns tobacco advertising and children. The statements delivered before the committee as well as the prepared statements of several senators are included. These senators are: John McCain, Ron Wyden, Wendell H. Ford, Olympia J. Snowe, Richard H. Bryan, and Bill Frist. A letter from Margaret S. Plattner, Director of the Teen Tobacco Enforcement Program, Department of Alcoholic Beverage Control in Kentucky, is also provided. The testimony of several witnesses and their prepared statements are included. The witnesses are: Joseph R. DiFranza, University of Massachusetts Medical Center, on behalf of Stop Teenage Addiction to Tobacco; Shirley Igo, Vice President for Legislation, National Parent Teacher Association; Alfred Munzer, MD, past president, American Lung Association and Director of Critical Care and Pulmonary Medicine, Washington Adventist Hospital in Maryland; Matthew L. Myers, Executive Vice President and General Counsel, National Center for Tobacco-Free Kids; and D. Scott Wise, Partner Davis, Polk, and Wardwell. An appendix provides the prepared statement of Senator Ernest F. Hollings. (MKA)

TOBACCO ADVERTISING AND CHILDREN**HEARING**

BEFORE THE

**COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE****ONE HUNDRED FIFTH CONGRESS****FIRST SESSION****SEPTEMBER 16, 1997**

Printed for the use of the Committee on Commerce, Science, and Transportation

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

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TOBACCO ADVERTISING AND CHILDREN

TUESDAY, SEPTEMBER 16, 1997

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met at 9:32 a.m. in room SR-253, Russell Senate Office Building, Hon. John McCain (chairman of the committee) presiding.

Staff members assigned to this hearing: Lance D. Bultena staff counsel; and Moses Boyd, minority senior counsel.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

The CHAIRMAN. This hearing will come to order. This is the second in a series of hearings that will explore the proposed global settlement of tobacco litigation. The focus of this hearing is simple: What can the Congress and the tobacco industry do to stop youth smoking? Our long-term goal is clear: To reduce smoking overall. But the facts are clear. They tell us that if we are to reduce adult smoking we must first reduce under-age smoking.

Very few adults take up smoking. It is a habit begun in adolescence or, all too often, even before adolescence is reached. Over 90 percent of those who smoke regularly start before they are 19. Approximately 3,000 kids start smoking every day. Estimates vary as to the average age of children who begin smoking, but those estimates vary between 12.5 and 14.5 years of age.

I know reducing the number of children who smoke is difficult and no single solution will simply accomplish the task. But it must be our primary goal.

The complexity of this probably is evident in Richard Kluger's discussion of why adolescents smoke. In the introduction to his book "Ashes to Ashes," Kluger discusses the various reasons individuals use tobacco. As to adolescents, Kluger says the following:

"One should not minimize the usefulness of smoking as coded defiance of authority, of the hand fate has dealt you, of sweet reason itself. It is most favored in the first instance by juvenile smokers as an initiator into the mysteries and empowerment of the adult world. The accompanying displeasures of nausea and dizziness assailing the novice inhaler are tolerated as rites of passage and the price to be paid for partaking in forbidden fruit. How easy to defy the tyranny of grownups by illicitly taking up a favored habit of theirs, all the better for the reek of sensuousness with no risk of rejection. For youth or adult life, the habit may serve to compensate for profound feelings of inadequacy, inferiority, or an abid-

(1)

ing bitterness that stems from degraded social status. Such victims of social pathology are suspected of smoking, not in spite of the hazards associated with it, but because of them."

Education will do much to solve these problems, but there are other, more immediate solutions available, such as changing the way cigarettes are advertised. I hope that our witnesses here today will share their thoughts on this matter with the committee.

It is widely believed that tobacco advertising helps create in children a sense that smoking is the cool thing to do and a way of expressing one's adult-like independence. Criticism of tobacco advertising campaigns vary from the allegation that they create a social norm of smoking acceptance to assertions that children are directly targeted when they are most susceptible.

Some research also suggests that children become addicted—excuse me. Senator Ford, I would like to finish.

Senator FORD. I apologize.

The CHAIRMAN. It is no problem.

Senator FORD. I was over here trying to work out something and it was on the verge of working out. I whisper loud. I apologize.

The CHAIRMAN. I thank my friend from Kentucky, who has always shown me great courtesy.

Some research also suggests that children become addicted to smoking after alarmingly few cigarettes. Some studies apparently found withdrawal symptoms after only two or three packs of cigarettes have been consumed. This research is particularly worrisome because it shows how very wrong kids can be about their ability to stop smoking even when they may think they are just trying it out.

As I have noted, since the causes of and motivation for youth smoking are complex and sometimes confusing, it is not a surprise that we know little for certain about how to stop youth smoking. It seems clear, however, that no single action will solve a problem. Youth smoking must be attacked on a number of fronts, including more firmly limiting the access to tobacco products, increasing the price of those products, using education and counter-advertising campaigns, and changing the way tobacco products are advertised and marketed.

During this hearing I look forward to exploring the causes of youth smoking and how we might reduce it. I thank the witnesses for their willingness to testify.

Today it is being reported that the President will oppose the universal tobacco settlement or support the universal tobacco settlement with significant modifications. In light of that, certainly the President—the information we have is that the President does not intend to come forth with a specific legislative proposal. In light of that disclosure, Congressional action on this subject will become difficult.

Regardless of the outcome of the global tobacco settlement, our primary duty remains clear—to aggressively address the issue of kids smoking. Let me repeat that statement: Regardless of what transpires with the universal tobacco settlement, we must first seek to address the issue of kids smoking. That will be this committee's top priority.

I look forward to working with my fellow committee members and the witnesses to achieve that goal.

Senator Ford.

[The prepared statement of Senator McCain follows:]

PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

This is the Committee's second in a series of hearings that will explore the proposed global settlement of tobacco litigation. The Committee will conduct further hearings later this month and in October. This hearing will focus on the proposed restrictions on the advertising, marketing, and sale of tobacco products to youth.

At the Committee's first hearing on the global settlement of tobacco litigation, I indicated that as we endeavored to develop a national policy for tobacco, specific goals are a helpful guideline. Number one on my list of goals for any legislation is reducing tobacco use by children.

If we are to reduce smoking among adults in the long term, we must start today with the nation's youth. Very few adults take up smoking—it is a habit begun in adolescence or, all too often, even before adolescence is reached. Over 90% of those who smoke regularly start before they are 19. Approximately 3,000 kids start smoking every day. Estimates vary as to the average age of children who begin smoking but those estimates vary between 12.5 and 14.5 years of age.

I know reducing the number of children who smoke is difficult and no single solution will accomplish the task. The complexity of this problem is evident in Richard Kluger's discussion of why adolescent's smoke. In the introduction to his book *Ashes to Ashes*, Kluger discusses the various reasons individuals use tobacco. As to adolescents, Kluger says the following:

. . . [one should not minimize] the usefulness of smoking as coded defiance—of authority, of the hand fate has dealt you, of sweet reason itself. It is most favored, in the first instance, by juvenile smokers as an initiator into the mysteries and empowerment of the adult world; the accompanying displeasures of nausea and dizziness assaulting the novice inhaler are tolerated as rites of passage and the price to be paid for partaking in forbidden fruit. And how easy to defy the tyranny of grown-ups by illicitly taking up a favorite habit of theirs, all the better for the reek of sensuousness with no risk of rejection. . . . For youth or adult alike, the habit may serve to compensate for profound feelings of inadequacy, inferiority, or an abiding bitterness that stems from degraded social status. . . . Such victims of social pathology are suspected of smoking not in spite of the hazards associated with it but because of them.

Youth smoking is clearly tied up in the tangled web of peer group interaction, parental example and the quest for personal independence. Children must learn about the health risks of smoking. Often, however, those risks are either discounted in the belief that they can stop smoking later or those risks foster a sense of rebellion and independence.

It is widely believed that tobacco advertising helps create in children a sense that smoking is the cool thing to do and a way of expressing one's adult-like independence. Criticism of tobacco advertising campaigns vary from the allegation that they create a social norm of smoking acceptance to assertions that children are directly targeted when they are most susceptible.

Some research also suggests that children become addicted to smoking after alarmingly few cigarettes. Some studies apparently found withdrawal symptoms after only 2 or 3 packs of cigarettes have been consumed. This research is particularly worrisome because it shows how very wrong kids can be about their ability to stop smoking even when they may think they are just trying it out.

Since the causes of, and motivations for, youth smoking are complex and sometimes confusing, it is not a surprise that we know little for certain about how to stop youth smoking. It seems clear, however, that no single action will solve the problem. Youth smoking must be attacked on a number of fronts, including: more firmly limiting the access to tobacco products, increasing the price of those products, using education and counter-advertising campaigns and changing the way tobacco products are advertised and marketed.

During this hearing I look forward to exploring the causes of youth smoking and how we might reduce it. I thank the witnesses for their willingness to testify.

Senator FORD. Senator Wyden.

The CHAIRMAN. Oh, excuse me. Senator Wyden.

**STATEMENT OF HON. RON WYDEN, U.S. SENATOR
FROM OREGON**

Senator WYDEN. Mr. Chairman, thank you, and let me begin by commending you for the fairness with which this committee is going at this issue. It is very clear that we are going to systematically go through the key issues, and I commend you for doing it this way.

Today's hearing is particularly important, Mr. Chairman, because the tobacco industry survives by replacing sick and dying smokers with new and naive ones, and advertising is the premier survival tool for this industry. My view is that the key for demobilizing the army of 3,000 kids who start smoking each day is to have an effective blockade against the industry's advertising and marketing that targets our children.

It seems to me, Mr. Chairman, that this advertising issue is so important that if you do not do that everything else is uphill. The kids get hooked, we face then the prospect of paying for the medical bills, and everything else represents an uphill challenge.

There are three primary reforms that the attorneys general have looked at with respect to advertising. They seek to eliminate the billboards, the tombstone ads, and of course give the FDA full authority to judge and restrict content of ads. I support these proposals, but my concern is that this cynically creative industry is going to spend vast sums to constantly try to get around these rules.

For example, we saw new evidence this weekend of this industry's capability of changing the channels. We learned, for example, of their efforts to recruit new smokers at the next demographic level, the older teenagers and the 20-something crowd with what are called "Camel clubs."

So I am very hopeful, Mr. Chairman, that we will look at more creative and bolder approaches to deal with this advertising issue. I noted that you said, Mr. Chairman, in your statement that you are interested especially in exploring this issue of counter-advertising. There is a substantial body of evidence that shows that that is perhaps the premier way to reach these young people.

I just want you to know, Mr. Chairman, I very much appreciate your leadership and look forward to working with you and all of our colleagues on this.

[The prepared statement of Senator Wyden follows:]

PREPARED STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM OREGON

Mr. Chairman, I thank you and our ranking minority member for organizing this hearing, today, on core issue of the global settlement proposal and the Senate's work to enact legislation encompassing that settlement.

The ball game, from my point of view, is about setting up tough new barriers between kids and cigarettes. The industry's advertising and marketing efforts clearly have focused on children.

That must stop.

This committee is ideally positioned to make sure that any legislative effort involving the settlement contains the strongest possible restrictions on advertising that would enslave our youngsters to the misery of tobacco related disease.

If we fail to do that, the dollars the settlement provides for state Medicaid program reimbursements and for plaintiff lawyers and their clients will do little to end this nation's number one health scourge. We will have scored no points for our youngest constituents who may begin a habit today that will maim and kill them years from now.

De-mobilizing the army of an estimated 3,000 youngsters who begin smoking each day . . . most of them to stay with the habit their entire lives . . . must be the focus of our battle. According to the surgeon general, smoking is an adolescent addiction. Something like 90 percent of all life-time smokers began the habit before they were 19. Thirty percent of our high school students are regular smokers.

Mr. Chairman, let me add that history will judge us harshly if we do not take this battle beyond our shores. U.S. tobacco manufacturers supply one of every four cigarettes smoked around the globe. And while smoking is being reduced within some demographic groups in America, tobacco use is skyrocketing in places like the Third World and the former Soviet bloc.

As I have said before, a deal which limits tobacco control efforts to domestic consumers of this deadly U. S.-manufactured product means that the settlement dollars will be generated by increasing sales to kids in Bangladesh, Bangkok and Bucharest. Unless we work together to create reasonable controls on U.S. tobacco company efforts in overseas marketing and sales, the international moral judgment against the United States will be unforgiving.

I understand that the chairman may allow a fuller discussion of this issue at our hearing in October. I hope that the committee will fully explore our significant trade-related jurisdiction with respect to both restrictions on any market-opening advice or support this government's trade agencies provide the tobacco industry, and in terms of health warning labeling manufacturers must apply to these products when exported.

Returning to the subject of today's hearing, the global settlement proposal encompasses three primary reforms of current advertising practice.

First, the elimination of all billboards and sponsorship of sporting events.

Second, limiting other tobacco ads to so-called "tombstone" displays, and ending use of either photographed persons or cartooned images as part of the advertisement.

Third, the settlement would give the Food and Drug Administration full authority to judge and restrict content of ads which may involve or imply health claims.

We would be hard-pressed to object to these changes, as well as the restriction against cigarette ads appearing in magazines and other publications which have a large percentage of youth readers.

The question is how far such advertising reforms get us toward that smoke-free society advocated by former Surgeon General Koop?

I am concerned that the tobacco companies will merely "change the channels" on us, and step up their efforts to recruit new smokers at the next demographic level . . . older teenagers and the twenty-something crowd. Good evidence of this possibility is reflected in R.J. Reynold's marketing efforts to set-up so-called "Camel Clubs."

As reported in the Washington Post on Sunday, this effort in Cleveland involves young agents of the company who visit bars frequented by young adults. These "Camel" clubbers blend in with crowd, make friends with the employees and pass out free packs of cigarettes. They pay the club owners thousands of dollars for such access, supply them with branded napkins, ashtrays and matchbooks, and finance joint marketing efforts.

This multi-million-dollar campaign is designed to reach youngsters. According to the manufacturer's marketing agent:

"By operating in the nightlife scene, the objective is to directly reach trend influencers, the people that start and maintain trends. Our association with trend influencers . . . will have a lasting impact on club goers who will begin to associate Camel with what is cool."

Mr. Chairman, I request that the full text of the Washington Post story I've referred to be included in the record at this time.

Let me say in closing that this cigarette marketing ploy I've just referred to represents a principal concern I have with regard to any agreement we make with the tobacco industry. I am afraid that no matter how strong its substance, or how toughly worded its provisions, the industry is just going to find new ways to entice young and impressionable people into the smoker fold. Let's not kid ourselves. The only way this industry survives is by replacing sick and dying smokers with new and naive ones.

I think we are going to have to work very hard in order to overcome this cynically creative business.

Thank you.

AFTER JOE CAMEL

By Mark Naymik

CLEVELAND—Those who doubt the ingenuity of U.S. cigarette manufacturers and marketers should come to Cleveland for an eye-opening weekend. Here, on the banks of the Cuyahoga River, a bold new strategy to hook young adults on smoking has been shockingly successful.

On most nights at Cleveland's hot night spots, a small group of fashionable, 20-something men and woman, each armed with a black canvas bag filled with Camel cigarettes, slip in and out of more than 30 area bars and clubs. They are Cleveland's Camel Club kids, sporting chic attire and names like Twig, Sheff Ma-Ma and Frankie Boy, as they are known. Their mission is simple: to blend in with the bar and club patrons, make friends with the bar staff and offer smokers free Camel cigarettes, R.J. Reynolds's premium brand.

Camel Club kids look as if they belong. They are R.J. Reynolds's ambassadors of cool. And they are the front-line workers in a relatively new, multimillion-dollar cigarette marketing campaign known as the Camel Club Program.

The goal of the Camel Club Program—beyond the obvious aim to increase sales of Camel cigarettes—is to create an alternative marketing campaign and cigarette distribution network, one that will not be affected by changing federal regulations or the scores of tobacco-related lawsuits clogging the courts. In other words, R.J. Reynolds has successfully created a sales program that no longer relies on Joe Camel, obnoxious giveaways and promotions or even on vending machines to move its smokes.

Cleveland is only one of about a dozen cities in which R.J. Reynolds has begun to market its cigarettes through bars and clubs frequented by the 20-something smoking crowd.

My examination of the Camel Club Program in Cleveland reveals that R.J. Reynolds already has a near monopoly on the sale of cigarettes in most of Cleveland's bars and clubs that cater to young crowds. R.J. Reynolds created this monopoly by spending more than \$120,000 on marketing agreements with club owners, who in turn give Camel Club kids exclusive access to their establishments. R.J. Reynolds also has targeted coffeehouse—havens for young smokers—and concert clubs that feature all-ages shows.

Several months ago, representatives from R.J. Reynolds and KBA Marketing, the young and progressive Chicago-based marketing firm that manages the Camel Club Program, came to Cleveland in search of trendy bars, restaurants, coffeehouses and concert clubs. About 10 area nightspots made the scouting team's hit list.

Next, KBA hired two Cleveland clubgoers with a knowledge of the city's nightlife scene and rented an office for them. These clubgoers became KBA's Cleveland "field reps." Their job was to contact club owners on the hit list and sign them to a one-year contract giving R.J. Reynolds exclusive rights to promote and sell Camel cigarettes in their establishments.

Bar and club owners would have been foolish not to sign. First, R.J. Reynolds offered them cash, between \$1,000 and \$18,000, depending on the club's size and traffic flow. For instance, one small coffeehouse received \$1,000, while a much larger concert club that features local and national rock and alternative acts received \$17,800, according to club industry insiders. R.J. Reynolds puts no restrictions on how the money can be used.

On top of the cash, R.J. Reynolds agrees to supply the bar owners with Camel beverage napkins, ashtrays, personalized matchbooks and bar paraphernalia such as neon lights, a marketing tactic similar to promotions traditional done with beer and liquor products through local distributors. R.J. Reynolds also buys regular full-page advertisements in an entertainment publication in each city to promote the clubs collectively, and helps in the printing of expensive, glossy fliers featuring their concerts and special events.

After the city managers signed the Cleveland bar and club owners to a contract, they arranged a meeting with staff members of each venue to outline what they would get out of the program.

Every bar or club staff member who smokes receives free Camel cigarettes, usually a couple of packs, each time a Camel Club kid visits. The staff receives Camel promotional items such as Zippo lighters, MagLite flashlights, T-shirts and hats. In return, R.J. Reynolds expects these bar staffers to promote Camel cigarettes by smoking Camel products while they work and by displaying individual Camel cigarettes behind the bar. You notice more people asking to purchase cigarettes from you, increasing your tips," the city managers are supposed to tell the bar staff at their orientation meeting, according to KBA marketing materials.

Another goal of the Camel Club Program is the elimination of vending machines, which display competitors' cigarettes, such as Philip Morris's Marlboro brands. To do this, KBA's city managers encourage bar and club owners to discontinue selling cigarettes in vending machines and, instead, exclusively sell Camel cigarettes displayed in small lighted kiosks placed behind their bars. Nearly all of the bars and clubs in the program have placed Camel kiosks, which hold 40 packs of cigarettes, behind their bars. Here, too, R.J. Reynolds's sales pitch was hard to refuse: Eliminate the cigarette and vending machine distributors—the middle men—and pocket more cash.

Being associated with a "cool" scene is the image R.J. Reynolds wants to build through its Camel Club Program. "By operating in the nightlife scene, the objective is to directly reach trend influencers, the people that start and maintain trends. Our association with trend influencers . . . will have a lasting impact on clubgoers who will begin to associate Camel with what is 'cool,'" reads KBA's marketing material.

KBA believes by using the Camel Club kids and "interacting with the club patrons using a low-key, under the radar approach, is our best way to establish that we understand and are a part of the scene."

Once in the scene, Camel Club kids, who are paid hourly and typically work four to six hours a night, try to convert smokers to Camel by offering them fresh, full packs of Camels in exchange for their remaining non-Camel cigarettes. In return, the smokers are supposed to fill out an address card, known as the "name generation" card, which is passed back to R.J. Reynolds.

According to KBA's marketing plan: "This personal approach to selling is designed to, if executed effectively, convert the smoker to Camel and show the adult smoker that Camel is 'cool' by the way we establish this subtle interchange."

According to the Centers for Disease Control, 400,000 Americans die every year from tobacco-related diseases, and the smoking rates for students in grades nine to 12 increased from 27.5 percent in 1991 to 34.8 percent in 1995. A 1996 University of Michigan study showed smoking among high school seniors has increased to the highest level in 17 years. And it is this demographic group, anti-tobacco advocates worry, that is attracted to such campaigns as the Camel Club Program.

Joe Camel may be dead, but his offspring are alive and well and having a party.

The CHAIRMAN. Thank you, Senator Wyden.

Senator Stevens.

Senator STEVENS. I have no comments.

The CHAIRMAN. Senator Ford.

STATEMENT OF HON. WENDELL H. FORD, U.S. SENATOR FROM KENTUCKY

Senator FORD. Thank you, Mr. Chairman.

I might say to my good friend, advertising will only be accomplished if the agreement is agreed to. Otherwise I do not think the fourth circuit is going to allow these restrictions under general law, or without the consent of the 10 agencies because of the freedom of speech we hear so much around here now. It becomes paid speech instead of free speech.

Mr. Chairman, I too want to thank you for calling today's hearing and your fair attitude that has been displayed, and I think it is important that that be made a part of the record. Of course, the settlement is not global, yet anyhow, because it leaves out my farmers and farmers in all the tobacco-growing States.

In any case, we will be reviewing a settlement that was drafted to stop youth smoking. But before the ink was even dry on the settlement, the anti-tobacco groups were attacking it, even though the settlement includes just about every idea to stop youth smoking that public health groups have ever come up with.

Just yesterday the White House said that any settlement with the tobacco companies must achieve the public health goal of "protecting America's children." White House spokesman Mike

McCurry went on to say that the FDA rule "achieves those public policy goals."

Now, everything Mr. Kessler said, Dr. Kessler, that his rules would do is in this bill and more. I am going to ask these witnesses in a minute, which Dr. Kessler do you believe?

Well, Mr. Chairman, the settlement we are reviewing includes the entire FDA rule, even though most of it—

The CHAIRMAN. Could you withhold a second?

Senator FORD. Sure.

The CHAIRMAN. Could I say, officer, we are hearing your beeper or someone's—

Senator FORD. Mr. Chairman, if we put that up there we will not be able to see the witnesses, and they are very handsome, particularly Matt. I enjoy seeing him. [Laughter.]

The CHAIRMAN. Thank you very much.

I am sorry. Please proceed, Senator Ford.

Senator FORD. That is all right. We are even now, are we not. [Laughter.]

The CHAIRMAN. I did not want you to be interrupted.

Senator FORD. Oh, well, that is all right. If we lose our good humor around here, we might as well go fishing, had we not.

Senator BURNS. I will go with you.

Senator FORD. OK. Well, Snake River is not bad for trout.

Now, where was I?

The CHAIRMAN. On the issue of Dr. Kessler.

Senator FORD. Well, that was kind of an afterthought. It was not down on my notes here.

Even though most of the FDA rule was struck down by a Federal court in Greensboro, the settlement goes way beyond the FDA rule by including complete bans on certain types of advertising, even though the Constitution prevents us from legislating those bans. It includes severe penalties on the companies if youth smoking is not reduced—now think about this—even though tobacco manufacturers have no control over whether the billions of dollars they pay is used effectively by public health groups.

It just does not make sense, Mr. Chairman, that I give you money, you advertise, and if my income is not reduced then I am fined. It just does not make sense. But I did not sign the agreement.

Mr. Chairman, it is unclear to me how something that goes so dramatically beyond the FDA rule can be characterized, as it has been and probably will be today, as a sellout to tobacco companies. It seems to me that, with all the add-ons being discussed, the settlement is in danger of collapsing under its own weight. With the FDA rule still in litigation, that means that the public health community could find itself without any tools it says are critical to reducing youth smoking.

We continue this debate today. Meanwhile, in the States concrete and effective steps are already being taken to fight under-age use of tobacco products. I am talking about SAMSHA, otherwise known as the Synar amendment. We passed this law back in 1992 and the final regulations came out in 1994. SAMSHA requires the States to pass and strictly enforce laws against under-aged access to tobacco products. It puts real teeth in these requirements by coordi-

nating Federal grant money on progress in reducing under-age access to tobacco products. I think we can all agree that the only surefire way to keep children from smoking is to keep cigarettes from children.

Now let us go home for a minute. In my own State of Kentucky, SAMSHA has had a dramatic impact. Before SAMSHA inspections and compliance checks were implemented, Kentucky had a compliance rate of about 40 percent. But with SAMSHA our compliance rate has gone to nearly 80 percent in 1 year. I have a letter from Margaret Plantner, the director of Kentucky's Team Tobacco Enforcement Program, containing this information and, Mr. Chairman, I would like to see that this letter is incorporated in the record.

The CHAIRMAN. Without objection.

[The information referred to follows:]

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
COMMONWEALTH OF KENTUCKY,
Frankfort, KY, September 15, 1997.

Hon. WENDELL H. FORD,
Washington, DC.

DEAR SENATOR FORD: Enclosed is the information you requested.

Section 1926 of the Public Health Service Act, or the SYNAR Amendment, provides that each state must have a state law prohibiting the sale or distribution of tobacco products by any manufacturer, retailer, or distributor to an individual under the age of 18. Unless each state has such a law in effect, that state risks the loss of Substance Abuse Prevention Treatment (SAPT) Block Grant funding from the federal Department of Health and Human Services. Kentucky risks the loss of 6.56 million dollars per year for its substance abuse treatment program, if enforcement of the state youth access to tobacco laws does not occur. The Youth Access to Tobacco law was enacted by the Kentucky legislature in 1990 and considerably strengthened in 1996.

The Department of Alcoholic Beverage Control has been designated as the primary enforcement authority of the youth access to tobacco laws. Currently, the Department has 23 sworn law enforcement officers working in the field. With the assistance of a minor, the Department conducts approximately 200 compliance checks per month of outlets selling tobacco products. This includes investigations of convenience stores, restaurants, gas stations, supermarkets, and local grocery stores.

The Department uses 15, 16, and 17 year old teens to work with ABC enforcement officers. The minors are given training prior to working in the field and paid an hourly minimum wage. The youth are a critical component to the Department's enforcement strategy.

Enforcement began in the fall of 1996. Statistically, from January-June, 1997, ABC conducted 1,041 compliance checks with a minor. Approximately 246 citations were issued during this period for a 23% non-compliance rate.

In July, 1997, ABC conducted the federal government SYNAR survey, which is required annually. This survey determines the compliance/non-compliance rate of retailers selling tobacco products to minors within the state. The number of establishments visited was 1075; 262 establishments were found to be in non-compliance. The outlets found not to be in compliance calculates to 24.3%; those outlets in compliance resulted in a 75.7% rate. These results demonstrate a significant decline in retailer non-compliance from 1996. Last year, the non-compliance rate was 59.5%.

Pursuant to Kentucky law, the fine structure is as follows for the seller/clerk:

1st offense—\$100—\$500

2nd offense—\$500—\$1000

The sale of cigarettes from a vending machine to a minor results in a \$250 fine. Retailers are responsible for proper signage. Violation of that requirement results in a \$100—\$500 fine.

After one year of consistent enforcement, the Teen Tobacco Enforcement Program has made a significant contribution to the reduction of sales of cigarettes and smokeless tobacco to youth. Hopefully, this momentum will continue unabated.

As media publicity about the overall tobacco issue eventually dissipates, public awareness will need to be maintained. One way to promote public awareness is to continue vigorous enforcement against youth access to tobacco products. Consistent

and aggressive enforcement helps to ensure that the good statistics; achieved in 1997 remain, and are even lowered in the years ahead.

If I may be of further assistance, please contact me.

Sincerely,

MARGARET S. PLATTNER,
Director, Teen Tobacco Enforcement Program.

Senator FORD. I think Ms. Plantner's letter makes it clear that consistent and aggressive enforcement of the SAMSHA requirement will ensure that the good statistics achieved in 1997 remain or are even lowered in the years ahead.

The purchaser is fined in Kentucky and the purchaser will be required, the teenager, the under-aged, and they will be required to do community service. I think that is something a little bit different, and it is working and it has doubled in 1 year the compliance rate.

Today we will talk about why children start using tobacco and what additional steps need to be taken to reduce under-aged tobacco use. Our witnesses will present a number of theories, particularly in relation to tobacco advertising. They might not mention that in 1994 cigarettes sales rose even though advertising expenditures dropped by nearly 20 percent—you will not find that in any of their statements today—or that 5 years of an advertising ban in Canada has brought smoking rates down just 1 point, or that without any new Federal regulations, any new Federal regulations, use of smokeless tobacco by children has declined to just 1.9 percent in 1996, and that is a decline of almost 40 percent, so less than 2 percent are using smokeless tobacco.

I hope they will discuss these statistics and I hope they will explain to us why similar efforts that have been tried and failed in other countries will succeed in the United States.

Mr. Chairman, we have known for a long time how to fight youth smoking, keeping tobacco from children. We passed SAMSHA to make sure that happens, and I have introduced a bill that is pending before this committee to build upon SAMSHA's success. My bill contains provisions that we all can agree on. We ought to focus on what we can do now to reduce teen smoking, not on how we can further restrict adult choice.

So, Mr. Chairman, I thank you again and I look forward to today's testimony.

The CHAIRMAN. Thank you, Senator Ford.
Senator Snowe.

STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Senator SNOWE. Thank you, Mr. Chairman. Thank you for holding this hearing. It is a very important hearing and I commend you for it. This clearly is an issue that this committee should focus on, and I appreciate the fact that, as you said, Mr. Chairman, regardless of what happens to the global settlement this is an issue that our committee will focus on with respect to restrictions of marketing and promoting tobacco products.

I think there is no question that the proposed settlement will be viewed successfully if it effectively reduces teen and youth smoking in this country, or it clearly will be regarded as an abject failure if it does not reduce teen smoking. That is why I think the commit-

tee's proceedings on this issue become critically important, because I think that this issue is pivotal to the entire issue, particularly when you look at the statistics on youth smoking in America.

One million of our children become addicted to tobacco every year. That is 3,000 new children developing this habit each and every day. In my home State of Maine we have one of the highest teen smoking rates in the country, with 38 percent of high school children smoking. Not surprisingly, Maine also has the highest smoking rate of any State for individuals between the ages of 18 and 30. So needless to say, the impact of these kids acquiring this habit will be devastating, as the Centers for Disease Control has estimated that nationally more than 5 million children living today will die early because of their decision to use tobacco, including, I might add, 31,000 premature smoking-related deaths in the State of Maine.

In light of these statistics, I find it appalling over the years that the tobacco industry has actively marketed an addictive product in a manner that is appealing to children. Consider that, according to a study by the Centers for Disease Control, 86 percent of kids who smoke prefer Marlboro, Camel, and Newport brand cigarettes, not coincidentally the three most heavily advertised brands, while these same three brands attract a significantly smaller share of the adult market.

Lest anyone still claim that these marketing campaigns were primarily targeted at adults, consider that between 1992 and 1993, when advertising for the Joe Camel campaign jumped from \$27 million to \$43 million, Camel's share among youth increased more than 50 percent while its adult market share did not change at all.

Anyone who claims that the industry has not been targeting children is ignoring the facts.

Mr. Chairman, as we review this agreement and seek ways to strengthen it, we should do it with an eye toward not only reducing youth smoking, but with a goal of eliminating it altogether. Therefore, because we know that advertising has an unquestionable impact on behavior, it is critical that the restrictions that this agreement imposes on youth advertising and marketing be strong and unyielding. Any compromise in these restrictions would be a compromise in the health and safety of our children and that option is simply not acceptable.

I would like to thank our witnesses for being here to testify today, and I thank you, Mr. Chairman, for calling this hearing. I look forward to an in-depth discussion of the proposed advertising and marketing restrictions in the settlement. Ultimately, these restrictions will have a profound impact on the broadest goal of this settlement, which is a major reduction in youth smoking. So today's hearing does carry a great deal of significance as we prepare for any forthcoming deliberations.

Thank you, Mr. Chairman.

[The prepared statement of Senator Snowe follows:]

PREPARED STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Thank you, Mr. Chairman. I would first like to commend and thank you for holding today's hearing because it addresses the very important topic of marketing and advertising restrictions on tobacco products. This clearly is an issue that our Committee should focus on, and I appreciate the fact that regardless of what happens

to the global settlement, you have said, Mr. Chairman, that this Committee will focus on this topic.

Mr. Chairman, let me make very clear from the outset: I believe that if the proposed settlement or some rendition of it is enacted in the months ahead, its most important outcome will be in terms of its impact on youth smoking. A significant reduction in youth smoking would cause many to consider this settlement a success—while a failure to significantly reduce youth smoking would lead many to consider this settlement an abject failure.

The statistics on youth smoking in America are appalling. One million of our kids become addicted to tobacco every year—that's 3,000 new children developing this habit each and every day. My home state of Maine has one of the highest teen smoking rates in the country with 38% of high school children smoking. Not surprisingly, Maine also has the highest smoking rate of any state for individuals between the ages of 18 and 30. Needless to say, the impact of these kids acquiring this habit will be devastating as the Centers for Disease Control has estimated that nationally more than five million children living today will die early because of their decision to use tobacco—including 31,211 premature smoking-related deaths in Maine.

In light of these statistics, I find it appalling that, over the years, the tobacco industry has actively marketed this addictive product in a manner that is appealing to kids. Consider that, according to a study by the Centers for Disease Control, 86 percent of kids who smoke prefer Marlboro, Camel, and Newport brand cigarettes—not coincidentally the three most heavily advertised brands—while these same three brands attract a significantly smaller share of the adult market. Let anyone still claim that these marketing campaigns were primarily targeted at adults, consider that between 1992 and 1993, when advertising for the "Joe Camel" campaign jumped from \$27 million to \$43 million, Camel's share among youth increased more than 50%, while its adult market share did not change at all.

Mr. Chairman, as we review this agreement and seek ways to strengthen it, we should do it with an eye toward not only reducing youth smoking—but with the goal of eliminating it altogether. Therefore, because we know that advertising has an unquestionable impact on behavior, it is critical that the restrictions this agreement imposes on youth advertising and marketing be strong and unyielding. Any compromise in these restrictions would be a compromise in the health and safety of our children—and that option is simply not acceptable.

I would like to thank our witnesses for being here to testify this morning, and thank you, Mr. Chairman, for calling this hearing. I look forward to an in-depth discussion of the proposed marketing and advertising restrictions in the settlement. Ultimately, these restrictions will have a profound impact on the broadest goal of this settlement, which is a major reduction in youth smoking. Therefore, today's hearing does carry a great deal of significance as we prepare for any forthcoming deliberations. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Bryan.

STATEMENT OF HON. RICHARD H. BRYAN, U.S. SENATOR FROM NEVADA

Senator BRYAN. Thank you very much, Mr. Chairman. Let me preface my comments by thanking you for holding this hearing and for the fairness in which you have approached it.

Smoking is the leading preventable cause of death in this country. We all know that. More than 80 percent of the people who smoke had their first cigarette before reaching the age of 18, and the startling fact is that most young people who experiment with the use of tobacco products do so at age 12 and 13. That means by the time those youngsters have attained their legal majority at the age of 18, hundreds of thousands, if not millions, are already addicted.

Tragically, of the nearly 3,000 teenagers who become regular smokers each day, 1,000 of them will die prematurely due to smoking-related illnesses. The consequences of this are not just with respect to the young, but have an impact upon all of us. The statistics of my own State are insightful. According to some surveys, Ne-

vada ranks at the top in terms of smoking prevalence—not a ranking, I must say, that we are proud to say we have.

This prevalence correlates in terms of significant medical costs to Nevada for the health care and treatment of the many individuals who suffer from smoking-related diseases. The most recent statistic indicates that \$198 million of direct medical costs are directly related to smoking-related diseases in Nevada. Specifically, in 1997 it is estimated that 1,100 Nevadans will die of lung cancer. All of this is preventable.

Although the tobacco litigation settlement seeks to prevent under-age use of tobacco products and many of its provisions are significant, there are still questions to be answered. The advertising restrictions are focused on children, as well they should be. Will the remaining advertising allowed for adults still reach children? Can any advertising be allowed that could have a public health impact on children or young adults? Are the look-back penalties strong enough to ensure a sustainable reduction in future smoking by under-aged children?

Finally, I was curious to note that there are no penalties provided for under-age youngsters either seeking to purchase or to possess tobacco products, much as we have for under-aged youngsters who seek to purchase alcohol or to possess alcoholic products.

Mr. Chairman, I look forward to hearing our witnesses in the distinguished panel respond to these and other questions that I know will arise during the course of these discussions this morning.

The CHAIRMAN. Thank you, Senator Burns.

Senator BURNS. I have no statement.

The CHAIRMAN. Senator Frist.

STATEMENT OF HON. BILL FRIST, U.S. SENATOR FROM TENNESSEE

Senator FRIST. Thank you, Mr. Chairman, and I too want to thank you and commend you for holding these important hearings. As a physician, as someone who has operated on thousands of patients who have suffered from the damages of smoking, I feel that I have a special responsibility in this debate on the proposed tobacco settlement.

First let me repeat that I, again as a physician and as someone who is aware of the scientific data, do urge my patients in the past and my constituents today to stop smoking if they have started and, more importantly, not to start.

As a physician I am especially concerned about the epidemic of youth smoking. We know each year that an additional one million young people become regular smokers. When the dust is cleared from this settlement, my primary goal will be to ensure that we have used our resources in the most effective way possible to put an end to teen smoking. I have three young sons and I urge them relentlessly and I hope and pray that they never smoke. As a parent, I want laws at the State and Federal level to ensure that my children cannot purchase tobacco.

I am excited about the opportunity we have today to thoughtfully examine some of the methodologies for reducing teen smoking. It is important that we do hear from the experts and target our ef-

forts toward scientific strategies, rather than bureaucratic non-solutions.

In addition we as parents, as school teachers, as responsible adults, can no longer look the other way when we see a young person smoking. New Federal standards and funding for State enforcement will make it absolutely clear that our children are not free to do permanent damage to their bodies through illegal use of tobacco.

Our society requires that young people reach an appropriate age of maturity before they vote, before they drive a car, before they drink alcohol. We should certainly require that these young people reach 18 before they make a decision about smoking.

In closing, I will note very briefly that I do continue to remain concerned about people who were not at the bargaining table in the tobacco settlement. While today's hearing is focused on youth smoking and advertising portions of the global settlement, we must continue to remember the interests of the tens of thousands of hard-working Tennessee tobacco farmers when making our decisions.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Frist.

We will call on our first two witnesses: Mr. Matthew Myers, who is the executive vice president and general counsel of the National Center for Tobacco Free Kids; and Ms. Shirley Igo, who is the vice president for Legislation of the National Parent Teacher Association.

Welcome to both witnesses. All the witnesses' written statements will be made a part of the record and you are free to summarize your statements or make your statements in whatever way you feel would be most helpful to the committee.

Ms. Igo, we will begin with you, and welcome.

**STATEMENT OF SHIRLEY IGO, VICE PRESIDENT FOR
LEGISLATION, NATIONAL PARENT TEACHER ASSOCIATION**

Ms. IGO. Thank you. Good morning.

The CHAIRMAN. Thank you for your involvement in this very important issue, along with your involvement in the television ratings.

Ms. IGO. Good morning, Mr. Chairman, and Members of the Senate Commerce Committee. My name is Shirley Igo. I am vice president for Legislation for the National PTA, which is the Nation's largest child advocacy organization with over 6.5 million members, all of whom are concerned about the health, education, and protection of children and youth, and we thank you for this opportunity to comment on the proposed tobacco settlement.

The National PTA passed its first resolution concerning tobacco use by children in 1926. At that time we urged our members to help eliminate smoking by minors. We passed numerous resolutions since that time and it continues to be a primary goal for our organization, our bottom line, to eliminate or at least significantly reduce the use of tobacco products by young people through public education, reduction in tobacco marketing and promotions, and other means.

While the National PTA believes that many of the settlement provisions related to children and youth are a step in the right direction, we cannot approve the package until stricter provisions are added. Any final settlement must guarantee that tobacco companies cease advertising to young people and, if they do recruit them, the companies must be required to pay dearly so that it hurts.

This hearing should concentrate first and foremost on children and their health. It should be about the 3,000 children who become smokers every day. It is about the estimated 4.5 million children and adolescents who smoke. It is about the one out of three young people who will die prematurely as a result of tobacco use. It is about smoking among high school seniors, now at a 17-year high. It is about tobacco companies making millions of dollars every year pushing a hazardous product and exploiting children's vulnerabilities to future addiction. It is about developing policies that immediately reduce or eliminate the tobacco industry's hold on many of our children.

In the proposed settlement we find many provisions in concert with our own positions. However, we believe that more stringent provisions must be added, and those are in our written testimony. The changes that we would recommend are extensive.

However, there are provisions in this program that we agree with and which we want to see retained. These marketing techniques directly affect children and youth and their decisions to use tobacco products, and we strongly support a number of them.

Throughout the years, National PTA has worked carefully and cooperatively with the Centers for Disease Control and Prevention and with the Coalition for Tobacco Free Children and with members of health organizations and volunteer operations to spread the word to children from concerned parents and community members that we know the dangers of smoking inherent in children's use. However, our people, our members, have been consistently thwarted by the other message that has come from the tobacco companies. Therefore we would encourage that the settlement include prohibitions on sponsorship of events by tobacco brands, by prohibiting advertising of non-tobacco items like clothing and gear, product placement on TV, Internet advertising, use of human images and cartoon characters in ads, outdoor and billboard advertising, and payment of fees to celebrities who smoke or glamorize tobacco.

We would encourage that the settlement include a ban on the sale of cigarettes in vending machines, penalties for vendors who violate youth access laws, that it include tobacco education programs, that it increase the size of health warning labels in change in product placement, that there be a requirement for warning labels on all tobacco advertisements, and an increase in the price of cigarettes and smokeless tobacco.

The issue of restricting advertising targeted at children precipitated considerable discussions at the National PTA level as we reviewed the settlement. Historically, PTA's telecommunications positions demonstrate healthy respect for the first amendment guarantee of free speech. Our position on this settlement does not include a full ban on tobacco advertising, but it does reflect a balance between protecting children and recognizing first amendment guarantees.

Our leaders, however, are fully aware that the tobacco industry will push the envelope as far as it can. Because there is a fine line between youth and adult advertising, certain questions must be addressed: What is the distinction between ads targeted to children and those targeted to adults? Who makes this distinction? What procedure should be established for citizens to easily challenge ads that they consider to be a violation of the settlement?

We believe guidelines should be developed around these concerns. National PTA offers to provide input and work with the appropriate parties and this area, much as we did in helping to develop the television industry's guidelines on the TV ratings system.

The National PTA thanks you for this opportunity to express our viewpoints on an extremely important public health issue. We are willing to work with you as you begin to craft policies that will spare this next generation of children the hazards of smoking and tobacco use. Children are our primary concern in this issue.

Thank you, sir.

[The prepared statement of Ms. Igo follows:]

PREPARED STATEMENT OF SHIRLEY IGO, VICE PRESIDENT FOR LEGISLATION,
NATIONAL PARENT TEACHER ASSOCIATION

Good morning, Mr. Chairman and members of the Senate Commerce Committee. My name is Shirley Igo. I am vice president for legislation of the National PTA, the nation's largest child advocacy organization. The PTA is comprised of over 6.5 million parents, teachers and other members in the United States, Europe, and the Pacific concerned about the health, education, and protection of children and youth. We thank you for this opportunity to comment on the proposed tobacco settlement that Congress and the administration will be examining during this congressional session. You requested that the National PTA share with this committee our position on the proposed tobacco settlement and reasons for taking our position. While the National PTA believes that many of the settlement provisions related to children and youth are a step in the right direction, we cannot approve the package until stricter provisions are added.

Right now, children and youth in the United States are exposed to a wide variety of pervasive, carefully crafted commercial messages encouraging the use of tobacco products. The cigarette companies spent almost \$5 billion in 1994 on advertising and promotion campaigns—that's \$13 million every day. Spending dropped from \$6 billion in 1993, but expenditures for marketing to attract kids remained steady.¹ To maintain current levels of tobacco use and revenues, approximately 5,000 new smokers must be recruited every day (about 2 million per year).

In just three years, one researcher said, "Camel's Old Joe cartoon character had an astounding influence on children's smoking behavior." The proportion of smokers under 18 years of age who chose Camels jumped from 0.5 percent to 32.8 percent following the introduction of Joe Camel. Many of these children had never smoked before. During this time, Camel's share of the adult market barely moved from its 4 percent level.² Children and youth constitute the most likely source of new smokers.³ This settlement must guarantee that tobacco companies cease advertising to young people. And, if they do recruit them, the companies must be required to pay dearly so it hurts.

The National PTA has a long-standing legislative policy that supports "federal legislation to provide for the regulation of, manufacture, advertising, or sales of products hazardous to children and youth" and provides for "consumer protection for youth and families." The National PTA passed its first resolution on youth tobacco use in 1926 urging its members to help eliminate smoking by minors, and it has been an important issue for the organization ever since. In addition, the National PTA has expanded its tobacco focus over the years to include support of the Federal

¹ Federal Trade Commission, "1996 Federal Trade Commission Report to Congress for 1994, Pursuant to the Federal Cigarette Labeling and Advertising Act, 1996.

² DiFranza, J. R/JR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children," *Journal of the American Medical Association*, December 11, 1991.

³ "Tobacco Advertising and Promotion," from *Growing Up Tobacco Free: Preventing Nicotine Addiction in children and Youth*, National Academy of Sciences, 1994.

Tobacco Labeling and Advertising Act of 1965, opposition to vending machines in areas accessible to youth, expansion of FDA jurisdiction over tobacco products, protection from environmental tobacco smoke, prohibition of smoking on school grounds, and support of community education campaigns about the dangers of smoking. The National PTA's bottom line is to eliminate or at least reduce the use of tobacco products by young people through public education, reduction in tobacco marketing and promotions, elimination of tobacco access, cessation programs, and other means. Anything less than this outcome will be opposed by the National PTA.

Issues of tobacco marketing, use, and addiction related to children and youth are paramount concerns of many of the National PTA's state congresses and over 30,000 school-based local units. Our local members have been active in conducting public information activities as well as pursuing legislation. Thousands of PTAs throughout the country have used the "Stop the Sale—Prevent the Addiction" kit to involve parents in educating youth about the hazards of tobacco use and to decrease the use of tobacco products by youth. The National PTA, in collaboration with the Centers for Disease Control and Prevention and the Substance Abuse and Mental Health Services Administration, distributed information on the kit to all local unit presidents. PTAs have also worked in their communities to inform educators, retailers, and parents about the new FDA regulations that require retailers to check photo IDs of tobacco purchasers who appear 27 years old and under. The PTA participated in the Campaign for Tobacco-Free Kids "Kick Butts Day" in April 1997. In October, PTA members will observe Child Health Month by promoting the American Academy of Pediatrics message "Smoking Extinct."

I come to you not as a medical doctor, an epidemiologist, or legal expert, although many of these professionals have been instrumental in publicizing the hazardous effects of tobacco use. Rather I come to you as a parent and a grandparent who believes that we MUST together cease the marketing and sales of this killer product to our children. I also come to you as a local PTA parent who has served in many capacities, including local unit president and state PTA president. I have participated in and led my share of grassroots campaigns, in concert with many other advocacy and health organizations, to reduce tobacco use in my community and state. From these perspectives, I can tell this committee with all certainty that the real victims of tobacco products are our children, who are snared by the enticements of the Marlboro man or the appeal of cartoon-like characters. It is very difficult for parents, who are concerned about steering their children away from tobacco, to compete with the expensive and appealing messages that children get from billboards, a wide array of youth-targeted products, and Internet advertising.

This hearing should concentrate first and foremost on children and their health. It is about the 3,000 children who become smokers every day.⁴ It is about the estimated 4.5 million children and adolescents who smoke, even though it is illegal for them to do so.⁵ It is about the one out of three young people who will die prematurely as a result of tobacco use.⁶ It is about tobacco companies making millions of dollars every year pushing a hazardous product and exploiting children's vulnerabilities to future addiction. It is about smoking among high-school seniors, now at a 17-year high according to a 1996 study by the University of Michigan. It is about developing policies that will immediately reduce and eliminate the tobacco companies' pernicious hold on many of our children.

The many position statements and resolutions passed by National PTA members and the PTA's board of directors on tobacco use reflect the frustration of many of our members in their attempts to eliminate tobacco use among young people. They see laws prohibiting tobacco sales to minors often being thwarted by state and local officials, and tobacco pressure groups who are concerned primarily about their economic status and not the health of children. Despite state laws prohibiting the sale of tobacco to minors, children easily can buy these products. A review of the 13 studies of over-the-counter sales conducted by the U.S. Department of Health and Human Services found that on average, children and adolescent were able to successfully buy tobacco products during 67 percent of their attempts.⁷ In addition, children and adolescents successfully purchase cigarettes from vending machines 88 percent of the time. One study reports smoking rates for students in grades 9–12

⁴Projected Smoking-Related Deaths Among Youth—United States," *Morbidity and Mortality Weekly Report*, CDC, November 8, 1996.

⁵"Preliminary Estimates from 1995 National Household Survey on Drug Abuse," Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services.

⁶*Morbidity and Mortality Weekly Report*, November 21, 1996, Centers for Disease Control and Prevention: Youth Risk Behavior Survey, 1995, Centers for Disease Control and Prevention.

⁷Erikson, A.D., et. al., A Baseline Assessment of Cigarette Sales to Minors In San Diego, California. *Journal of Community Health*, 1993.

increased from 27.5 percent in 1991 to 34.8 in 1995.⁸ Research shows smoking rates for African-American male students almost doubled during that time from 14.1 percent to 27.8 percent.⁹ In virtually no other public health area are the statistics so incriminating as they are in the area of teenage smoking and use. And in no other public policy area has an industry made so many promises that give the appearance of concern for children while avoiding meaningful change. In fact, every one of the industry's promises not to market to children have been broken on a regular basis. As an advertising executive who worked on the Marlboro account put it:

"When all the garbage is stripped away, successful cigarette advertising involves showing the kind of people most people would like to be, doing the things that most people would like to do, and smoking up a storm. I don't know of any way of doing this that does not tempt young people to smoke."¹⁰

It is with this kind of skepticism of the industry that the National PTA recently completed a review of the tobacco settlement reconciling National PTA's current positions on children and tobacco use with provisions in the settlement.

In the proposed settlement, the National PTA found many provisions in the settlement in concert with its own positions. However, the National PTA believes that more stringent provisions must be added to justify the immunity that the tobacco industry seeks. Any effective agreement will require that public health promises be backed with regulatory and enforcement teeth. We must assure that it is not in the financial interest of the tobacco companies to market to children.

The National PTA supports the following provisions of the agreement:

- Tobacco marketing prohibitions, including the following:
 - Sponsorship of events by tobacco brands
 - Advertising on nontobacco items like clothing and gear
 - Product placement on TV
 - Internet advertising
 - Use of human images and cartoon characters in ads
 - Outdoor and billboard advertising
 - Payments or fees to celebrities who smoke or glamorize tobacco
- Ban on the sale of cigarettes in vending machines
- Penalties for vendors who violate youth access laws
- Tobacco education programs
- Research on youth tobacco addiction
- Funding for tobacco cessation assistance
- Increase in the size of health warning labels and change in product placement
- Requirement for warning labels on all tobacco advertisements
- Increase in the price of cigarette and smokeless tobacco

It is imperative that the agreement holds tobacco companies accountable, through both financial and nonfinancial incentives, for significantly reducing underage smoking and use of smokeless tobacco. If tobacco companies are to receive immunity for enticing underage youth to use hazardous tobacco products in the past, they must now take full responsibility for making corrections, both in prevention and addiction cessation. It is our opinion that in the current settlement, the companies get far more in prosecutorial relief than they are obligated to return in compensation for reducing youth tobacco use. The penalties must be severe enough to assure that tobacco companies will reduce youth and teen tobacco use.

The National PTA recommends the following changes in the settlement:

- Repeal the federal tax rebate provisions allowing the companies to undermine the intent and effectiveness of the "look back" provisions.
- Eliminate the 12-year moratorium that prohibits the FDA from banning nicotine. The FDA must have the same authority to regulate tobacco products that it already has over other drugs, including authority over the manufacture, sale, labeling, distribution, and marketing of tobacco products.
- Specify that the definition of "tobacco products" include pipe tobacco, cigars, smokeless, and any other tobacco to guard against product shifting by the industry or the customer.
- Eliminate the \$2 billion cap on the annual surcharge payment and base the cap on company profits from underage use or on total company profits in the domestic market. Basing payments on profits removes industry incentives to make profits from underage youth consumers. In addition, the surcharge should be based on each individual company's profits rather than on collective industry profits. Individual

⁸"Tobacco Use and Usual Source of Cigarettes Among High School Students-United States, 1995," Morbidity and Mortality Weekly Report, CDC, May 1996.

⁹Centers for Disease Control and Prevention, "Preventing Tobacco Use Among Young People: A Report of the Surgeon General, U.S. Government Printing Office, Washington DC, 1994.

¹⁰1994 Surgeon General's Report, p. 101.

companies who make efforts to reduce youth tobacco use should not be responsible for companies that don't.

- Add excise tax penalties and tobacco reduction rates as contained in "The No Tobacco for Kids Act," which the National PTA supports. The current "look back" provisions are totally inadequate. The noncompliance fee of 8 cents per pack of cigarettes for companies that do not meet reduction standards is totally inadequate.

- Establish safeguards to assure that tobacco companies do not use loopholes in the settlement agreement to get around the marketing restrictions.

- Ensure that the settlement not preempt the initiation, adoption, and enforcement of state or local laws that are more comprehensive in reducing sales, marketing, and use of tobacco products.

- Require the industry to make public all research and other documents, especially those concerning the marketing and promotion of tobacco products and research on the addiction of children and youth.

- Include a strong severability clause making it clear that if any provision is declared invalid, the constitutionality of the balance of the statute is not affected.

- Increase the excise tax to at least \$1.00 per pack. One of the most effective means of reducing tobacco use among young people is to raise the price.

The issue of restricting advertising targeted at children precipitated considerable discussion as the National PTA reviewed the settlement. Historically, National PTA's telecommunications positions demonstrate healthy respect for the First Amendment guarantee of free speech. Our position on the settlement does not include a full ban on all tobacco advertising, but reflects a balance between protecting children and recognizing First Amendment guarantees. We limit our position to restrictions on ads and marketing that are directed to children and youth in an effort to be sensitive to the First Amendment. However, our leaders are fully aware that the tobacco industry will "push the envelope" as far as it can. Because there is a fine line between youth and adult advertising, certain questions must be addressed:

- What is the distinction between ads targeted to children and those targeted to adults?

- Who makes this determination?

- What procedures should be established for citizens to easily challenge ads that they consider to be a violation of the settlement?

Guidelines should be developed around these concerns. National PTA offers to provide input and work with the appropriate parties in this area, much as we did in developing the television industry's guidelines on the TV rating system.

The National PTA thanks you for this opportunity to express our viewpoints on an extremely important public health issue. We are willing to work with you as you begin to craft policies that will spare this next generation of children the hazards of smoking and tobacco use.

The CHAIRMAN. Thank you very much, Ms. Igo, and again I want to thank you for you and your organization's involvement in this issue, and we appreciate very much not only your verbal statement, but I read your complete written statement and I think it was very helpful.

Mr. Myers, welcome. We again want to express our appreciation for the efforts that your organization has made long before this tobacco settlement was reached. We view you as one of the most knowledgeable people and your organization, amongst the most knowledgeable organizations on this issue, and we appreciate you being before the committee today, and please proceed.

STATEMENT OF MATTHEW MYERS, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL CENTER FOR TOBACCO FREE KIDS

Mr. MYERS. Thank you, Mr. Chairman and Members of the committee, and I want to thank you for holding this hearing. You have touched on an incredibly important point as part of the global settlement or any discussion of tobacco use.

Let me briefly summarize my statement and then move on to a discussion of the issues orally. There are a few points I think need to be headlined in what we are talking about here. First, as many

Members of this committee have correctly noticed, despite the headlines and the sense that we are winning the war against tobacco, we are in a time of crisis. We are in a time of crisis because tobacco use rates among children have increased every year over the last 5 years. Among high school seniors, smoking is at a 17-year high.

Any illusion that we are about to succeed in what is the really important battle, and that is the battle to reduce the number of kids who start and the number of adults who stop, is simply misplaced. We have a need to act and to act now.

Second, tobacco marketing and advertising practices do affect children and do contribute to the problem. In my testimony I have cited a number of comprehensive studies. I do not want to get into that today, but for the record we would be happy to put into the record the very substantial record that has been examined, not only by the Food and Drug Administration, but every major public health organization in this Nation, by the governments of New Zealand, Canada, and Great Britain and others. They all reach the same conclusion: tobacco advertising works.

Third, we cannot adequately address the problem of tobacco and children without restricting the type of advertising that has the greatest influence on kids. As Dr. Kessler has said so eloquently so often, it is one thing to cutoff the illegal sale of tobacco products, but unless we deal with the factors that make those products appealing to kids we will be swimming upstream for a long time.

Fourth, there is no single magic bullet. Any serious effort over the long run to reduce tobacco use among children must include a comprehensive effort. We should not fool ourselves about that. This is not going to be easy. It is not a one-time shot.

In addition to restricting the type of advertising that directly influences kids, we need to do, as Senator Ford said, cut back on youth access. But we also have to do more. We have to take seriously the impact of public education. Public education works. We need to have periodic and significant price increases because of their impact on children. We need a regulatory system to keep this industry honest—not to put it out of business, but to keep it honest. We need it to make adjustments to whatever system of restrictions and incentives we come up with, to adjust to new circumstances that we cannot possibly envision today.

We need it to ensure that the products that people continue to use are less hazardous and less addictive than today's products. And finally, we do need to restrict the impact of environmental tobacco smoke. For children we need to do so because we have concrete evidence of the impact on the respiratory system of these, but it is also incredibly important for role modeling purposes.

Finally, in terms of my key points, while the proposal negotiated by the State attorneys general and the tobacco industry is flawed and we agree should not be enacted without being strengthened significantly, it provides the right vehicle for the most fundamental change in tobacco control policy in this country in history, and we should be certain that whatever happens in the coming days, that that opportunity is not lost. It really is time for us to move beyond the rhetoric and citing of statistics to rolling up our sleeves and making hard choices and beginning to make progress on the issue.

Now, the committee asked us to talk a little bit about tobacco advertising today. I mentioned to you that there are a number of comprehensive studies. But you know, you do not need detailed econometric data to know what is going on here. Eighty-six percent of all kids who smoke, smoke the three most heavily advertised brands. Sixty percent of all kids smoke one brand, Marlboro. The Marlboro cowboy is the perfect icon, the rebellious, independent, strong image that attracts young boys and young girls alike.

It is also no coincidence that smoking among children of Camel cigarettes skyrocketed with the introduction of Joe Camel. Equally as important, not only did kids switch to Camel, kids started smoking for the first time. Joe Camel was accompanied by the first major overall increase in tobacco use rates among kids.

How does the tobacco industry do it? Well, it is not a simply and direct thing, and the analysis in the Food and Drug Administration August 28 rule provides a comprehensive review. But we cannot get away from looking at what is going on here. Now, we have brought a couple of examples, because traditional advertising is just the tip of the iceberg.

Take a look at two traditional advertisements that are running today, currently today. When the R.J. Reynolds Tobacco Company eliminated Joe Camel, do not for a moment think that they stopped their marketing efforts to kids. The advertisement I have in front of us with what I call the "vamp ad," this sensual looking woman whose major and direct appeal is to young adolescent boys, is unproven in its effectiveness because it has not been on the market long enough. But anybody who has looked at tobacco advertising over any prolonged period understands that that is not aimed at anybody the age of any one of us in this room today.

The ad I have behind me, a Koal advertisement associating smoking with racecar driving, the sleek, slick, risk-taking, is about the best way one can imagine reaching young adolescent boys. The data shows it works.

But that form of traditional advertising is truly the tip of the iceberg. Look at the top of toy cars with Camel and Skoal images. These are not meant for adults, let us not kid ourselves. It is the beginning of association of these tobacco products with young children, long before they reach that smoking age decision, so that by the time they get there they are used to, they are comfortable, and they positively associate these products with these things.

Look at these tee shirts, turning children into literally walking billboards, allowing them to become the icons of the racecar drivers that they would all like to be, the risk-taking people. You know, in the sixties the tobacco industry promised it would not use sports stars as models because young kids role model after them. What is the racecar driver of today?

You have to look at tee shirt after tee shirt and you begin to see. Who wears these? Who do these appeal to? We cannot just deal with direct advertising. But this too is only the start of a long plan for the tobacco industry.

In front of me I have a CD giveaway. For what? Virginia Slims "It's a Woman Thing" music concert tour. Young women associated Virginia Slims with this, reaching out to those teenagers and young adults on a daily basis in every part of their life.

Joe Camel. While Joe Camel is gone, the giveaways are not. Buy two packs, get one free, get a tee shirt. Forty percent of the kids who smoke in this country have one of these sorts of items.

Even when you go to work out, you have your Marlboro bag. It literally never moves away from you. Every place you go, it associates tobacco use with all of the traits that young adolescents, boys and girls, are looking to discover during that early period of adolescence.

But we also need to be careful as we move forward, because this industry is clever. It is one of the reasons why you need to combine specific advertising restrictions with mechanisms for making change. Even as advertising restrictions were being discussed, the R.J. Reynolds Tobacco Company introduced for this country a whole new advertising gimmick—packages of cigarettes which themselves become walking, talking advertisements. Now, Joe Camel may be gone, but the concept of cool characters on cigarette packs means that we cannot ignore the fact that these become the marketing tool of tomorrow if we are not careful.

The packs are combined with Camel cash, so that if you have not gotten one of these tee shirts on your own you are going to be able to use the Camel cash, if you smoke enough, to get these and other cool toys.

Mr. Chairman and Members of the committee, the tobacco industry is not spending \$5 billion a year on this form of advertisement to reach you or me. It is no, no coincidence that kids smoke the brands that are heavily image advertised. It is no coincidence that the magazines that contain these types of advertisements are the magazines with the heaviest youth readership, magazines like Sports Illustrated, the young women's magazines where they use the Virginia Slims woman to associate smoking as a young person with thinness.

Now let me talk about the tobacco agreement for a brief moment if I can, because it does represent the most dramatic recommended change in how we deal with tobacco advertising in the history of this Nation. It is not—it is not, I repeat—a total advertising ban. It does not seek to prevent the tobacco industry from either advertising to adults or advertising containing product characteristics that adults would take into consideration.

The reality is kids look at pictures, adults read words. The tobacco industry will remain free to use words, but they will not be free to use these pictures. This agreement starts with the base of the Food and Drug Administration rule. It will eliminate all of this color advertising in magazines and newspapers read by large numbers of kids. Thus we will no longer see this type of advertisement in Sports Illustrated or a host of other young people-oriented magazines and newspapers.

It will give the Food and Drug Administration the power to review these rules to see if the tobacco industry has chosen other venues later on for us to be able to move. It will eliminate all cartoon characters and human images. Not an answer by itself, but it means that the next time R.J. Reynolds announces that it is eliminating an image it will not replace it with a woman like this one.

It will eliminate all billboards, because, while the FDA eliminated billboards within 1,000 feet of schools, how many of our children come to school much further than that and on a daily basis, past billboards everywhere.

It will eliminate sports sponsorship, so that the Marlboro race team no longer becomes an icon for our young children. It will eliminate advertising in sports stadiums. It will eliminate outward-facing advertisement in convenience stores, a loophole in other rules, so that kids will not face these sorts of ads.

It takes into account that in other countries with similar restrictions the tobacco companies have used tobacco brand advertising on non-tobacco products to circumvent the rules. Go to Malaysia, go to another country, you will find, for example, a travel agency under "Marlboro Country," or clothing lines under "Marlboro" or "Camel" or "Salem." What they literally do is turn non-tobacco products into ads for tobacco. This agreement would prevent that and cut it off now.

This agreement took a hard look at the hard question of Internet advertising, which is just now coming into focus and, with the voluntary agreement of the tobacco industry, but to be enforced through consent decrees, it will eliminate the problem before it starts and in a way that will avoid the first amendment problems that other restrictions on Internet advertising have had—a critical step to cutoff an advertising avenue before our children become nailed by the newest technology.

In short, on this issue the agreement with the tobacco industry is by no means perfect, but it does represent the most extensive change in tobacco marketing and advertising ever seriously discussed in this country, and by focusing like a laser beam on the type of advertising which appears to have the greatest impact on kids, everything I have shown you today would be prohibited under the agreement. It allows us to take a giant step forward as part of our comprehensive effort.

By giving the Food and Drug Administration the authority to adjust these rules as circumstances dictate, it means we will not be locked into solutions permanently that the tobacco industry learns how to circumvent.

This agreement on its advertising restrictions takes into account the very best we know without attempting to overreach. Now, in the rest of my testimony I have also talked about the other components of the agreement and a comprehensive plan. But I want to conclude with a simple statement: The hearings before this committee and other committees have demonstrated that the agreement with the tobacco industry needs to be strengthened in very significant and important ways. The discussions between the tobacco industry and the State attorneys general, however, have moved us forward in ways that would have been unimaginable only months ago. The tragedy will be if we do not figure out how to translate how far we have come to the enactment of a truly comprehensive policy that has the opportunity for working in the coming months.

Thank you.

[The prepared statement of Mr. Myers follows:]

PREPARED STATEMENT OF MATTHEW L. MYERS, EXECUTIVE VICE PRESIDENT AND
GENERAL COUNSEL, NATIONAL CENTER FOR TOBACCO-FREE KIDS

Good morning Mr. Chairman, and members of the committee. My name is Matthew Myers. I am the Executive Vice President and General Counsel of the National Center for Tobacco-Free Kids, a national organization created to protect kids from tobacco by raising awareness that tobacco use is a pediatric disease, by changing public policies to limit the marketing and sales of tobacco to children, by altering the environment in which tobacco use and tobacco policy decisions are made, and by actively countering the tobacco industry and the influence of its special interests. The National Center is a membership organization with 126 partners, including many of this nation's major public health organizations and other groups concerned about the health and welfare of our nation's children.

SUMMARY OF KEY POINTS OF OUR TESTIMONY

Let me summarize the key points of our testimony:

1. Despite the headlines and the sense that we are winning the war against the tobacco industry, we are in a time of crisis because we are losing the most important battle. Tobacco use is up among children and is no longer falling among adults. The growing hostility against the tobacco industry has not translated into fewer adults or children smoking. Smoking among children has risen each of the last five years. Among high-school seniors it is at a 17-year high and, if current trends are not reversed, more than 5 million kids currently alive today will eventually die of tobacco-caused disease. It is time to enact the policies that can make a difference.

2. Tobacco marketing and advertising practices today affect and contribute to the problem of tobacco use among our children. The case is overwhelming that tobacco marketing does make tobacco products more appealing to children. As the Food and Drug Administration concluded on August 28, 1996 after its exhaustive examination of all of the most up to date evidence, tobacco "advertising plays a material role in the decision of those under 18 to use tobacco products." *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Federal Register at 44466.

3. We cannot adequately address the problem of tobacco and children without restricting the type of advertising and marketing that make tobacco products appealing to children and that have the greatest influence on children. When former FDA Commissioner David Kessler stated that it is not enough to make tobacco products less accessible children, an effort to reduce tobacco use among children must also reduce or eliminate the "powerful imagery in tobacco advertising and promotion that encourages young people to begin using tobacco products," *Remarks of David Kessler at Columbia University School of Law, March 8, 1995 at page 19*, he echoed the conclusion of every major credible organization that has studied this issue.

4. Any serious effort to reduce tobacco use, particularly among children, over the long run must include a comprehensive program. There is no single magic solution. At a minimum the comprehensive program must include (a) restrictions on youth access to tobacco, (b) restrictions on tobacco marketing that makes tobacco products appealing to children, (c) a sustained, well funded public education campaign, (d) effective health warnings, (e) periodic and significant price increases, (f) a regulatory system to keep the tobacco industry honest, make adjustments to the mechanisms being used to reduce tobacco use among children as circumstances dictate, and mandate that all possible efforts are being made to reduce the health hazards and addictive effects of tobacco products and (g) restrictions on where people smoke to protect children from environmental tobacco smoke and minimize the role modeling that occurs when adults smoke around children.

5. While the proposal negotiated between the tobacco industry and the state Attorneys General is flawed and should not be enacted without being strengthened in significant ways, the agreement provides the best available opportunity for bringing about the type of fundamental, long term change needed to reduce tobacco use in this nation. The opportunity presented by this agreement should not be lost. Neither this agreement, nor any agreement is a complete solution, but once strengthened, this agreement can provide the vehicle for an important step in the right direction.

TOBACCO ADVERTISING AND MARKETING

Any effort to reduce tobacco use among kids will be less successful unless it also addresses the factors that make tobacco products appealing to children and one of those factors is the five billion dollars a year the tobacco industry spends advertising and marketing its products. As the Institute of Medicine of the National Academy of Sciences concluded in its landmark 1994 report, *Growing Up Tobacco Free*:

- The weight of evidence indicates that tobacco advertising and promotions encourage children and youths to use tobacco
- Some types of advertising and promotion especially appeal to children and youths
- Bans or restrictions on advertising and promotion appear to reduce tobacco consumption.

In this portion of my testimony, I would like to touch on three key issues briefly. First, what is the tobacco industry doing? Second, what is the evidence that tobacco marketing affects kids? Third, should tobacco marketing be restricted and how well does the agreement negotiated between the tobacco industry and the state attorneys general address this problem?

The purpose of my testimony is only to provide the briefest of overviews, but the accumulation of evidence is stunning. To gain a more comprehensive evaluation of the evidence I suggest the following sources which we will be happy to enter into the record of this hearing for the Committee's consideration:

1. The Food and Drug Administration's thorough analysis of the evidence linking marketing to youth tobacco use. 61 Federal Register at 44465 through 44538, August 28, 1996.
2. Institute of Medicine, National Academy of Sciences, *Growing Up Tobacco Free*, 1994.
3. A Report of the Surgeon General, U.S. Department of Health and Human Services, Public Health Service, *Preventing Tobacco use Among Young People*, 1994 at pages 159 through 203.
4. Smee, C., "Effect of Tobacco Advertising on Tobacco Consumption—A Discussion Document Reviewing the Evidence," Department of Health economics and Operational Research Division, London (1993)—Prepared by and for the Government of the United Kingdom.
5. "Health or Tobacco—An End to Tobacco Advertising and promotion, Toxic Substances Board, Government of New Zealand, Wellington, New Zealand, May 1989, as modified by "A Reply to Tobacco Industry Claims About Health and Tobacco", ISBN0-477-04574-X.

These comprehensive reviews of the evidence are also buttressed by numerous individual studies which we will be delighted to provide the Committee.

CURRENT TOBACCO MARKETING PRACTICES

In 1995, the last year for which we have official figures, the tobacco industry spent \$4.9 billion advertising and promoting its products. Its efforts permeated every walk of life and every form of promotion.

Tobacco imagery with unique appeals to adolescents and young children dominate cigarette advertising. The Marlboro Cowboy, the most dominant and successful figure in youth oriented marketing, and other cigarette ads and promotions reach out to kids from the pages of *Sports Illustrated* to the Indy Race track. Our kids wear Marlboro hats and T-shirts and carry Marlboro gym bags. They attend tobacco sponsored rock concerts and walk and drive by tobacco billboards on their way to school.

It is no coincidence that 86% of all children who smoke, smoke the three most heavily advertised brands—Marlboro, Camel, and Newport. It is also no coincidence that 60% of all kids who smoke, smoke Marlboro, the perfect icon for the rebellious, risk taking adolescent seeking to find his or her identity. Finally, it is no coincidence that the introduction of Joe Camel nearly a decade ago turned Camel cigarettes from a brand that children had not smoked for decades into the second most popular brand among kids. Equally important, it is no coincidence that the introduction of Joe Camel was accompanied by the first significant increase in overall smoking rates among kids in over 10 years. Joe not only grabbed his share of the market, he expanded it by bringing in new kids. Joe Camel was not the first of the tobacco industry's success stories with kids in recent years. Smokeless tobacco use among children in our nation had virtually died out by the early 1980's when U.S. Tobacco introduced the Skoal Bandit and surrounded the Bandit with football heroes, a gaudy racing team, and millions of dollars of image oriented advertising. Almost immediately, the use of these products among adolescents skyrocketed and we are still paying the price today.

What type of ads and marketing practices are they using? Look at the images that leap out at you from the Kool and two Camel ads we brought with us today, and anyone who thought that R.J. Reynolds had stopped marketing to kids when they dropped "Old Joe" with great fanfare only has to look at the latest Camel ad featuring a sensual female literally calling out to teenage boys.

But these ads are just the tip of the iceberg. Look at the toy cars we brought with us today advertising Camel, Skoal, Winston, and Kodiak. How many adults do you

know who play with toy race cars. Here is also an advertisement for the new Philip Morris rock concert tour featuring Virginia Slims under the name of "It's a Woman Thing Music." With its rock concert tour, Philip Morris is adding to the tobacco industry's reliance on sponsorship with heavy appeal to children. Skoal and Camel blanket NASCAR events—and the Marlboro Racing Team pervades Indy racing events. Auto racing sponsorship is the perfect tool for attracting kids. Not only do substantial numbers of young people attend these events, millions more watch on TV. Today's race car driver has become the sports hero for million of young boys. And, if any child has missed all of these marketing gimmicks, these T-shirts and hats reach out to image oriented kids, turning them into walking billboards. R.J. Reynolds has even begun to plan for the day when traditional advertising is not permitted. Last year they introduced these "Collector" packs of Camels, filled with the same imagery we see in today's tobacco ads.

As traditional tobacco advertising has come under greater and greater scrutiny, the tobacco industry has increased its use of non-traditional marketing techniques that have a uniquely effective and powerful impact on children. One of the largest growth areas of tobacco promotion is called Retail value-added Specialty Items. A Retail value-added Specialty Item promotion is a mechanism by which someone who purchases a pack of cigarettes is given free items containing cigarette brand logos, like free key chains or lighters or coupons to obtain items such as T-shirts, jackets, hats, and other highly visible utilitarian items. These promotions serve multiple purposes, but most importantly, they encourage teenagers to purchase the cigarettes to get the "free" gift.

By pairing the purchase of a tobacco product with a highly desirable specialty item, like a T-shirt, the tobacco industry expands the appeal of the tobacco product to adolescents in at least three ways. First, most of these items appeal almost exclusively to children. Second, the use of this merchandise by large numbers of young people, even when they are not smoking, creates an impression that tobacco is still being widely used, as teens turn their clothes into walking billboards. In fact, while more children who smoke use these items, many kids who do not smoke also wear tobacco brand clothes obtained through these promotions. Third, the promotion makes the purchasing decision for a person with little disposable income more attractive by making the potential consumer think he or she is getting something for nothing.

Retail value-added promotions are not the only alternative mechanism by which the tobacco industry seeks to influence purchasing decisions which have a significant impact on children. For example; tobacco manufacturers have significantly increased what they pay store owners for shelf space and how much they pay store owners for stocking a wide variety of brands, often more brands than are justified by consumer demand. These payments to store owners result in tobacco products being displayed more prominently and over a wider area than they would otherwise be displayed, making tobacco more easily available and giving the false impression that tobacco use is no less popular than it was many years ago. This false impression is an important component of the industry's effort to make children believe that it is "cool" to smoke because "everyone is doing it." Thus, numerous surveys document that teenagers routinely overestimate the number of their peers who smoke.

Tobacco manufacturers have also increased how much they pay store owners to place tobacco products in locations where customers can pick up the cigarettes on their own. A number of studies have demonstrated that these types of "self service" displays serve as an important source of tobacco products for minors because children are less likely to purchase a tobacco product if they have to ask a clerk.

The most significant change in tobacco marketing strategies probably relates to the tobacco industry's recognition that its potential consumers today are younger, poorer and more price sensitive than twenty years ago. There has now been a very dramatic rise in promotions designed to put cigarettes into the hands of consumers either at no cost or at a cost far below the average retail price. These techniques take many forms.

Retail value-added Promotions often include coupons that reduce the price of a pack of cigarettes or include packaging pursuant to which a consumer who buys one pack of cigarettes gets a second pack free. What better way to hook individuals uncertain if they want to start smoking, or who are still in the experimental stage of tobacco use, than to give it to them for free or make them think they are getting it for free and eliminate the cost disincentive to the purchasing decision.

ADVERTISING AND THE AGREEMENT WITH THE TOBACCO INDUSTRY

The FDA concluded that "restrictions on advertising must be part of any meaningful approach to reducing smoking and smokeless tobacco use among young people."

61 Federal Register at 44466. As a result the FDA proposed to restrict those forms of advertising that it found had the greatest influence on young people and to eliminate the loopholes that the tobacco industry had used to circumvent partial advertising restrictions in other countries. The proposed agreement with the tobacco industry builds on the marketing restrictions in the Food and Drug Administration's initiative, which have been struck down by federal court on the grounds that the FDA does not have statutory authority over tobacco marketing. That ruling is now on appeal.

FDA's plan would have restricted tobacco advertising in magazines with significant youth readership to black-and-white text with no images or colors; end merchandise promotions; prohibit tobacco brand sponsorship of sporting and cultural events (although corporate sponsorship would still be allowed); eliminate most point-of-sale advertising; and restrict the proximity of outdoor tobacco ads to schools and playgrounds. In short, it would have eliminated virtually all of the forms of advertising which we have shown the Committee today.

The proposed agreement goes beyond the FDA Rule to further remove tobacco advertising and the images in tobacco advertising that have the greatest impact on children. In addition to the FDA's provisions, it would also eliminate all tobacco billboards and outdoor signs, including all signs in stadiums and arenas and signs in enclosed areas, such as stores, that face outward, eliminate all human images and cartoon characters from tobacco advertising and from cigarette packages, signaling a permanent end to the Marlboro Man and Joe Camel's appeals to kids, as well as the sensual woman who has replaced Joe Camel for R.J. Reynolds and the Newport "Alive With Pleasure" people who have made Newport so popular with adolescents. It will also eliminate the Virginia Slims image that has been copied by other brands and which contributes to the attitude among adolescent girls that tobacco use is a legitimate way to stay thin. It would also prohibit tobacco advertising on the Internet, ban product placement in movies and on TV, and includes further restrictions on point-of-purchase advertising.

In other countries advertising restrictions have been negated by the clever introduction of non-tobacco products using tobacco brand names. This, too, has been prohibited.

Given the sensitive nature of restrictions on advertising in relation to the First Amendment, the proposed agreement, like the FDA rule, focuses on tobacco marketing aimed at kids and, therefore, does not represent a complete ban. It still allows the tobacco companies to factually advertise their products to adults in contexts and forums that are not appealing accessible or to minors. Critically, the agreement authorizes the FDA to close any loopholes that are discovered after the agreement is implemented and leaves the FDA with residual authority to take such additional actions to restrict tobacco marketing to reduce tobacco use among children as circumstances dictate.

Finally, the agreement has one benefit that would not be possible through legislative or regulatory action. The proposed agreement includes a provision for the incorporation of the advertising and marketing restrictions into consent decrees between the tobacco industry and the state attorneys general and possibly the FDA in an effort to insulate these important advertising and marketing changes from legal challenges from those who are not a participant to the agreement. Thus, the agreement would provide greater guarantees that the proposed changes would actually take effect and remain in effect.

To the extent that tobacco advertising is part of the problem, the proposed agreement between the tobacco industry and the state attorneys general represents an exceptional step in the right direction.

OTHER COMPONENTS OF AN EFFECTIVE EFFORT TO REDUCE TOBACCO USE AMONG CHILDREN

Although the focus of this hearing is on advertising and marketing, we believe it is important to discuss the other components of a comprehensive tobacco control policy as part of our testimony.

Youth Access to Tobacco Products: The evidence is unquestionable that today children in the United States have little or no trouble purchasing tobacco products despite the fact that it is already illegal in every state to sell tobacco products to children. While some children get some of their tobacco from friends and family, the reality is that retail outlets and vending machines are major sources of tobacco for kids. A review of 13 studies of over-the-counter sales to kids showed that children and adolescents were able to buy tobacco products 67 percent of time. Kids have even less difficulty obtaining tobacco products from vending machines, from which they are successful buying cigarettes more than 80 percent of the time. Studies also

demonstrate that half-way measures, like placing locking devices on vending machines, have not been successful and that only by eliminating vending machines will we remove them as an easy source of tobacco products for children.

The provisions in the proposed agreement designed to make it more difficult for children to illegally obtain tobacco products build on the rule issued by the Food and Drug Administration on August 28, 1997. They are also based on the recommendations of the 1994 report of the Institute of Medicine of the National Academy of Sciences entitled *Growing Up Tobacco Free* and the 1994 report of a working group of 29 state attorneys general. In addition to the restrictions in the FDA Rule, the agreement would eliminate all vending machines, place tobacco products behind the counter and out of the reach of children, make it more difficult for children to obtain cigarettes and other tobacco products through the mail and, most critically, establish a nationwide licensing system administered at the state level for all sellers of tobacco products with a system of graduated penalties and license suspensions to those sellers who fail to comply with the provisions designed to discourage sales to minors. The agreement also provides dual enforcement authority with state attorneys general and local officials as well as funding provided by the tobacco industry for FDA and for state and local officials charged with enforcement. To the extent that enforcement is the key to reducing illegal sales to children, and it is, the agreement builds substantially on the Food and Drug Administration's prior actions and does so with funds provided by the tobacco industry.

Studies indicate that efforts to restrict youth access to tobacco products need to be highly successful in order to affect actual consumption of tobacco by kids. It was for that reason that the agreement placed so much effort on insuring that the enforcement tools and resources not available to the FDA were included. When minimum-age laws are thoroughly enforced, it can make a difference: A comprehensive community intervention in Woodbridge, Illinois, for example, resulted in illegal sales to kids dropping from 70 percent to less than five percent in two years. Subsequently, experimentation and regular smoking dropped by more than 50 percent among seventh and eighth graders.

The tobacco industry has long said that it supports efforts to reduce illegal sales to minors. Why, therefore, are these additional steps necessary? Despite its rhetoric, the tobacco industry has frequently subverted real efforts at the local, state and federal levels to restrict youth access to tobacco by seeking to add loopholes to these effort which virtually guaranteed that they would be ineffective. The industry's lack of good faith was again demonstrated when it opposed FDA's appropriation effort this year to obtain the funds needed to enforce the youth access aspect of its rule. A comprehensive national tobacco plan must address this problem.

Public Education: As Dr. Kessler and Dr. C. Everett Koop testified before the Senate Agriculture Committee only last week, a critical component of any comprehensive program aimed at reducing tobacco consumption is a well-funded, sustained, sophisticated public education and counter-marketing program. On this point every credible expert agrees. While several states have initiated such campaigns, no such nationwide campaign exists today. In the proposed agreement, funds from the tobacco industry would pay for a nationwide public education effort designed to discourage children from starting and to encourage adults to quit.

History indicates that public education campaigns can have a significant effect on tobacco consumption. In the late 1960's and early 1970's when the FCC required broadcasters to provide a significant amount of time for anti-tobacco messages for every tobacco advertisement, per capita cigarette consumption declined seven percent. There was also a decrease in adolescent smoking. Evidence from other countries also indicates that a strong public education campaign can have a significant impact on tobacco use prevalence.

Recent experience in several states with anti-tobacco education campaigns have shown that such efforts can help reduce the prevalence of youth tobacco use or, at the least, slow the increase. In Vermont, for example, researchers found that school health education programs combined with a mass-media campaign resulted in kids being 35 percent less likely to have smoked in the past week than youth exposed to only the school-based program. In addition, recent evidence from Massachusetts and California indicates that the increase in youth consumption in those states, which have extensive education campaigns, has been significantly less than what has occurred in the country as a whole.

Health Warnings: Part of a comprehensive education campaign are health warnings on tobacco packaging and advertising. Today, the U.S. has among the weakest, least visible health warning in the developed world and FDA has no authority to change or strengthen them. The proposed agreement changes the current health warnings and replaces them with stronger more succinct health warnings, modeled after those now in effect in Canada, such as:

- Warning: Cigarettes Are Addictive.
- Warning: Cigarettes Cause Cancer.
- Warning: Smoking Can Kill You.
- Warning: Tobacco Smoke Causes Fatal Lung Disease In Non-Smokers.

Under the agreement the warnings would be moved to the front of the cigarette pack and the most prominent side of the smokeless tobacco product package, would occupy at least 25 percent of the top of the front of the package, and would appear in either black lettering on a white background or white lettering on a black background. FDA would be given the authority to revise the warnings in the future.

Price Sensitivity: One of the quickest and most certain mechanisms for driving down tobacco use in the short run, particularly among kids, is to substantially increase the price of cigarettes and spit tobacco products. Studies have shown that for every ten percent increase in the price of a pack of cigarettes, overall smoking rates drop by approximately three to five percent. Because children have less disposable income, they are even more likely than adults to quit smoking, or not start, as a result of substantial price increases.

Empirical evidence to support these conclusions comes from the experience in a number of states and from other countries. In the 1980's Canada increased its excise taxes repeatedly and by large numbers. As a direct result tobacco use among Canadian children dropped precipitously. More recently, evidence from states that have enacted significant tobacco tax increases, such as California and Massachusetts, also indicates that increased prices have a significant effect on consumption of tobacco.

At the same time it is important to understand that price increases are not a panacea, nor is a one time price increase a long term solution, no matter how large. Many nations have excise tax rates far higher than the United States and still have higher tobacco use rates among their children. It is the price change that prompts the change in behavior. While the reduction in tobacco use caused by a price increase is immediate, the impact of the price increase wears off unless the price is repeatedly raised to continue to drive down tobacco usage.

Because increasing price is an effective method to ensure that kids smoke less, the proposed agreement with the tobacco companies requires that the companies "passthrough" some of their costs to the consumers. Various estimates indicate that the industry would raise prices by 62 to 75 cents per pack as a result of the proposed agreement. By itself the price increase that would result from the agreement as it was negotiated by the state attorneys general would drive down tobacco use rates by about 17% or one-third of the youth reduction targets. Of course, according to the FDA, restrictions on youth access and tobacco marketing also contribute to overall reductions in tobacco usage among children. A higher price increase would have a greater effect in reducing consumption by youth and that is why Drs. Koop and Kessler recently recommended that Congress seek to enact a \$1.50 price per pack increase as part of any comprehensive package.

Environmental Tobacco Smoke: Exposing children to environmental tobacco smoke (ETS), also known as "secondhand smoke," is dangerous. The Environmental Protection Agency categorizes ETS as a "Class A" carcinogen. Studies have shown that ETS is responsible for approximately 3,000 cancer deaths every year and may be responsible for many more heart disease related deaths.

Children are particularly vulnerable to secondhand smoke. Studies indicate that children contract hundreds of thousands of cases of asthma, respiratory infection, and middle-ear infection as a result of exposure to ETS. Also, new evidence suggests that smoking by parents, both during and after pregnancy, may cause thousands of cases of Sudden Infant Death Syndrome (SIDS) each year.

Any national program to protect kids from tobacco should contain the strongest safeguards possible for kids from ETS. The proposed agreement would provide the first nationwide protection from exposure to environmental tobacco smoke by prohibiting smoking in public places (any building regularly entered by 10 or more individuals at least one day per week) and most private workplaces. The agreement would exempt nonfast food restaurants, bars, casinos, and bingo parlors, but would allow states and local government to decide whether smoking should be restricted in these areas.

As the 1994 Institute of Medicine's report on tobacco and youth, *Growing up Tobacco Free*, points out, an important benefit of restrictions on smoking in public places is that it cuts down on the frequency with which children see adults smoking and, therefore, cuts down the role modeling effect of adults smoking everywhere. Nonsmoking signs also reinforces the message to youth that smoking is a behavior not encouraged by society.

Industry Incentives for Change: To date, the tobacco industry has a clear incentive to market its products to kids: children are the key to their future customer base. A comprehensive national program should do everything possible to deter tobacco

companies from seeking to attract children. The proposal agreement contains a provision that would impose penalties on the tobacco industry if the percentage of children who use tobacco doesn't drop by 30 percent in five years, 50 percent in seven years, and 60 percent in ten years. The figures were derived from the FDA's stated goal of reducing tobacco use among children by 50 percent over seven years but the agreement is even stronger than the FDA's proposal because it requires that the reduction be calculated off of a base of the average number of children who used tobacco products from 1985 to 1996. There have been many opinions on the level of penalties that the industry should face if the youth smoking targets are not met. This should be an area of careful examination by Congress to ensure that the penalty and target levels provide a real incentive for the tobacco companies to end their intentional practices aimed at kids and to make them true partners in the effort to reduce consumption by kids as much as possible.

CONCLUSION

The key to the evaluation of the proposed agreement or any other national plan is, will it reduce tobacco use and will it save lives more effectively and more rapidly than the available alternatives. The proposed agreement is flawed and should not be adopted without being strengthened. At the same time the agreement has moved the debate forward in ways that would have been unimaginable only six months ago and can and should serve as a vehicle for implementing truly effective long term change to accomplish this critical public health goal. We look forward to working with the Committee to see that this hope becomes a reality.

The CHAIRMAN. Thank you very much, Mr. Myers.

In a previous hearing, Mr. Myers, the State attorneys general, with the exception of the attorney general of Minnesota, said that if we change this agreement significantly then the whole agreement falls apart. Are you concerned about that?

Mr. MYERS. I am concerned about that, but it is more important that we do it right, and I think that has got to be the fundamental question. There will be a balance in order to come up with something that is tough enough to work, but realistic enough to pass.

The CHAIRMAN. Attorney General Humphrey argues that we should allow the States to move forward with their litigation in order that the concessions that were made in this agreement do not have to be made and, in light of the Florida agreement and the Mississippi agreement, that we would be better off, is his argument. How do you respond to that?

Mr. MYERS. No one has a crystal ball. We cannot predict whether we will be stronger or weaker in 6 months, whether the fourth circuit will rule one way or the other, whether the Texas State case will come out one way or the other, or whether the many cases that are currently pending.

The CHAIRMAN. That is exactly what Mr. Humphrey's argument is: Let us see what happens in our case before you act. Yet the other attorneys general are saying that they want Congress to act immediately, otherwise there may be action taken by the courts that could fundamentally undermine the agreement.

Where do you come down on that?

Mr. MYERS. I come down that the first and foremost responsibility of all of us is to make sure that we are supporting a policy that has the best possible opportunity to work, and only then to move that policy. If there is risk-taking in waiting, we should take the risk. But we should also recognize that waiting does pose some additional risks.

The key to me is for us to roll up our sleeves and make sure that we have a game plan for enacting the best possible policy that will reduce tobacco use the most over the long run. We should not be

rushed into action by artificial deadlines. We also should not think that there is an endless summer.

The CHAIRMAN. But again in all due respect, we are getting severe criticism from the State attorneys general for not moving forward, and people like you and Ms. Igo I think are the referees here to some degree as to whether you think they are correct, that somehow we are derelict in our duties by not coming and rapidly endorsing that settlement, or should we do as Attorney General Humphrey and others have said: Look, look at this thing. The President is going to make some recommendations today to strengthen the agreement, which from what I hear I think all of us would welcome to some degree. Let the Minnesota case move forward.

Where do you—and Ms. Igo, I would ask you—where do you come down on that issue? Because, very frankly, we are not very comfortable with being accused of failing to act on an issue that is so important to the American people.

Mr. MYERS. Let me try to be as specific as I can. I participated in those discussions, as you know. I understand the sensitivity and the balances that comes out with any discussion, and I think that has to be taken into consideration.

However, the first and foremost responsibility is to do it right. In doing it right, we have to take into consideration, not that the sky is going to fall if we do not do it tomorrow and not delay for delay's sake, but to take the amount of time that is going to be necessary to analyze this correctly, make the adjustments to ensure we have a policy that we will be comfortable with into the next century. If we can do that quickly, we should. But we should not respond to artificial deadlines.

The CHAIRMAN. Ms. Igo, do you have a view on that?

Ms. IGO. Our primary concern is that children have protection and that the marketing pieces as well as the other pieces I indicated in our written testimony be there to give parents one more time some help in combating this insidious problem.

I would agree that this does not need to be rushed into. I would, however, say that I am concerned that State-by-State agreements may not address the entire problem for all of our children. I would also say that as this proposed settlement, stands now, we would not be in support of it because of the deficiencies that we see in it. However, I would agree with Mr. Myers that—

The CHAIRMAN. Let me put the question to both of you this way, because I am trying to deal with the realities of the situation. That is what I think is important to all the Members of this committee. Apparently the President's recommendations will not be specific and there will not be a legislative proposal presented to the Congress, which is the normal procedure here, which then leads everyone to say: Well, for this year, since we are going out of session in some weeks, that we probably will not move forward with some overall settlement or perhaps any settlement of any kind.

Would it then behoove us to focus, sort of following up with what you just said, Ms. Igo, to focus our attention on the most serious problem and look for some proposal that we could enact possibly this year, but certainly early next year if not this year, that would focus entirely on the children's aspect of this issue and leave some of it up to further negotiation, in other words a piecemeal ap-

proach, addressing the most serious aspect of this issue first and then a follow-on with the other agreements.

Does that make any sense, or have you got a better strategy?

Ms. IGO. I would not offer to you a better strategy. I would point out to you that National PTA passed its first resolution in this regard in 1926. We have been working State-by-State in a piecemeal operation. We have been continually thwarted by lack of cooperation and by lack of initiation and by laws that are absolutely ignored.

Our concern is that we lose thousands of children every year. I lost my husband, who was a teenage smoker, to lung disease this year. I do not want to lose any of my children because we have taken a piecemeal, step-by-step process. But I agree that children should be our primary focus at this point.

The CHAIRMAN. Well, let me just quickly add, some of the proposals here, which I do not have time to go over, which you made, I think the people who made the settlement would not find acceptable. That is another reason why I think perhaps we ought to prioritize.

Mr. Myers.

Mr. MYERS. Senator McCain, before we move to piecemeal legislation I think we ought to make a determined effort to see if we can come up with a comprehensive proposal, because piecemeal change has not been shown to have a substantial or long-term effect. If we have no choice, it is better than nothing. But I do think we are better off rolling up our sleeves and trying to get our arms around this.

There will never be any single proposal that everyone endorses every single provision of. The question is can we use this opportunity to come after this problem in a broad way that will truly make a long-term impact, and if we can then it is worth waiting a couple of extra months. What we should not do is allow this opportunity to pass, because we simply cannot afford to have another generation of kids without meaningful, determined national activity.

The CHAIRMAN. Thank you very much.

Senator Wyden.

I have a number of other questions.

Senator WYDEN. Thank you. Thank you, Mr. Chairman.

Let us, as Mr. Myers says, roll up our sleeves specifically on this advertising issue, because to me this is the industry's survival operation. I mean, this is the only way they can go from folks who are sick and dying today to get new young people.

My concern is you have almost made your case too well. You have shown how this cynically creative industry has an enormous capacity to get around virtually all of this stuff. I mean, in one sense—take sharks, for example. Sharks in effect stop swimming, they die. This industry, if they stop marketing and promoting, they are going to die as well. And they are not going to do that.

What we saw this weekend, for example, with respect to the Camel clubs and the way their marketing firm operates. Just let me quote from this. They are working under the radar. They have got a new way to associate Camels with being cool and targeting young people.

My question is why not just say the best way to keep kids from starting smoking is to raise the price, raise the price significantly, and get on with it. Is that not a better way than to try to figure out all these kinds of approaches that, by your own evidence, they seem to be awfully good at circumventing?

Mr. MYERS. My short answer is no. You need to do both if you are going to be successful. Dr. Kessler was right when he said if you really want to get at teen smoking you have got to cut out youth access, you have got to eliminate the main tools to make it appealing, you have got to do public education.

He has also, more recently, correctly said, as you have, that any comprehensive plan has got to take a look at price sensitivity. We do need to be sure that we raise the price of tobacco products significantly as part of our effort. But let us not be fooled. It is not a magic bullet, either. Lots of countries have higher tax rates than we do and also have higher smoking rates among children.

Kids respond to the price change, not the absolute value. The response time is a relatively short one. We get the greatest immediate impact and then, unless it is followed up with additional activity, you see backsliding. So price increases has to be one of the tools we use, but we would be making a significant mistake if it was the only tool that we used. We will not change attitudes.

My children will remember the Marlboro cowboy for as long as they live. My hope is that their children will not know who that is.

Senator WYDEN. My concern is that Joe Camel and the Marlboro man seem to be producing progeny at an extraordinary rate, and I want to see some sensible counteradvertising approaches as well. But it seems to me that this idea of the \$1.50 that is being talked about on the price side could send a very powerful message to kids.

What is your sense of what that would do to reduce youth smoking?

Mr. MYERS. As you know, my organization, all the organizations with whom I have worked, have long supported a very major increase in the excise tax as one of the best ways, if not the best way, to dramatically and immediately reduce tobacco use among children. But we need not be confused. It is also not a long-term solution. It will drop tobacco use rates dramatically, but if we are going to bring about a fundamental long-term change in attitudes among our kids we have to do the other things as well.

Senator WYDEN. What is your sense about the value of counterads? Based on everything I have seen—the California experience and elsewhere—that looks like dollar for dollar it is probably the best approach. What is your sense of that?

Mr. MYERS. I absolutely agree. A major public education or counter-advertising campaign is a critical component of any overall plan. That is why the agreement itself has a provision that would have the tobacco industry put up \$500 million a year, indexed to inflation, for that purpose. Part of the reason for that was that it was hard for any of us to see how the Congress of the United States would find that kind of loose change hanging around to do that.

At the same time, my organization is committed to working with States to help States develop their own mechanisms for doing

counter-advertising and raising excise taxes in those States. We need to do both.

Senator WYDEN. Last question for you is: What is your assessment of these Camel clubs? My sense is to see this industry so bold in trying to circumvent what you and the attorneys general have done, when this is an issue before the Congress, shows just how far they are going to push, in the words of your associate, the envelope in terms of getting around these advertising restrictions.

Mr. MYERS. No one should look at this agreement and assume the tobacco industry is going to give up. That is why the agreement needs to be tough, enforceable, and have a mechanism like the Food and Drug Administration to not only enforce it, but enhance it in ways that are needed. The tobacco industry's move to market to people in their twenties requires a significant debate in Congress and among the American public about how it feels on marketing that focuses on young adults. It is not a simple question, and a very serious problem.

Senator WYDEN. My time is up, Mr. Chairman. But the point is, look at the language they are using. They are talking about Camel kids, they are talking about trying to reach kids that are 18, barely starting to the club kind of scene. This is not adult style marketing. This is kid style marketing.

I will tell you, my sense is that there are effective advertising approaches that we can use to keep kids from starting to smoke. But the longer I am in this—and we have worked together on many of these issues—the more convinced I am that it is going to be the market that really does it.

And Mr. Chairman, I thank you for all the time.

The CHAIRMAN. Thank you, Senator Wyden.

Senator SNOWE.

Senator SNOWE. Thank you, Mr. Chairman, and thank you both for your testimony here this morning.

Obviously, there are a number of issues to consider in terms of the effectiveness and the impact of what is included in the global settlement. We are dealing with an industry that has been historically reliant on attracting new customers to essentially become addicted to tobacco products before the age of 18 or 19.

So my question is this: Mr. Myers and Ms. Igo, could you tell us whether or not you think that under the proposed settlement for these restrictions, the industry could conceivably circumvent these proposed restrictions?

Ms. IGO. I think it is very obvious and my testimony indicated that I do believe that they could be circumvented, and that is why I believe there is a need for additional guidelines. I think we have one opportunity to make this right. I think we need to look at all of the circumstances surrounding the settlement and make sure that the things that are put in place address all of the concerns that we have about this issue as it affects our children.

Mr. MYERS. Senator SNOWE, I do not think it is possible to write an agreement that the industry could not circumvent, and that is why I think any agreement has to combine two things: the toughest and fairest rules about what we know how to do; and a process for imposing additional rules when the tobacco industry comes up with things we have not been able to think of.

That was the goal of combining specific rules and regulations with full FDA authority to look at this issue in the future.

Senator SNOWE. I would concur with you. I think that, obviously, there is that potential and I could see down the road that we would find ourselves in exactly the same situation, with essentially little if any penalty on the industry. The other part of the settlement that I wanted to ask you about is the lookback provision.

As I see it, the \$2 billion cap is a negligible penalty in the final analysis, with the companies able to enjoy a rebate if they took the steps outlined in this settlement to reduce teen smoking. So companies could basically be in a breakeven position with respect to that penalty in the final analysis.

I think, frankly, the other part of it is has the potential for loopholes that could be developed in order to circumvent these restrictions.

Mr. MYERS. Let me say two things, because you raise a very important point. We should not lose sight of the importance of the concept of the lookback provisions. It would be the first time the tobacco industry would be penalized based on smoking rates. As a concept, it is an important introduction to deal with their ability to circumvent rules and regulations. Therefore, it would seem to me that it is a concept on which we ought to build and correct the flaws of the negotiated agreement, rather than discard. I think that is a critical point.

No. 2, the rebate provision needs to be looked at very carefully because in some respects the rebate provision can also be a strengthening provision. The way the rebate provision was drafted, it was designed to say you could not get a rebate unless, A, you obeyed all the rules. But B and C are important for good reasons. They say you cannot get a rebate unless you also take additional other actions that may be reasonable to reduce tobacco use among kids. What it was designed to do was to impose burdens on the industry to take actions that would be outside the rule that would take the FDA 2 years to put in rule form, but say to the industry: If the FDA points out something additional that you should be doing and you do not do it, even though they have not had the opportunity to put it in a rule, it may cutoff your right to a rebate.

So it can be a powerful offensive tool for us.

No. 3, it says you are not entitled to a rebate if you take any action which undermines the goals. And that is very important, because Senator Ford said in his opening statement: How do you explain the fact that in 1994 advertising and marketing dollars of the tobacco industry went down, but smoking rates among kids went up? Well, there is a very easy explanation. In 1993 the major tobacco companies dropped dramatically the price of all of their premium brands. In fact, by 1994 we were feeling the effect of the price decrease.

Cigarettes of the brands kids smoke most were suddenly cheaper to them, and we saw one of the more dramatic rises in usage among kids. Now, that is not something that the FDA can take into account. Part three of the rebate provision was designed to give the FDA a tool to take into account those sorts of things that were beyond their jurisdiction, but within the control of the tobacco industry, that could affect youth smoking.

So what I am suggesting with that is that we need to look at that very, very closely. We should make sure we build on the concept, take what is good in that rebate provision, and try to mold it into a mechanism for preventing the tobacco industry from doing what Senator Wyden would say, which is finding every possible way to circumvent the rules.

Senator SNOWE. Would you agree on strengthening the \$2 billion and the penalty because it is based on, as I understand it, current profits?

Mr. MYERS. That is right, it was indexed to inflation, but based on all the economic analysis I have seen I think we need to roll up our sleeves again and figure out a way to ensure that the cost to the industry is high enough to serve the role, and that is to be a disincentive to market to kids.

Senator SNOWE. One other question. I am interested in this whole idea of allowing advertising in black and white. Have there been any studies to document whether or not that would have an impact on youth smoking? Black and white can be used effectively in other ways.

Mr. MYERS. Yes.

Senator SNOWE. So I am curious as to whether or not there have been studies to document as to whether or not that would have an impact on teens.

Mr. MYERS. The concept of black and white text-only advertising was taken from the Food and Drug Administration's rule itself, and in their rule they discuss the best available data about the impact of black and white text-only advertising. It focuses most heavily not on black and white text, but on the role of imagery, color, on kids and the lack of data that it is possible to do the same thing with kids in black and white text.

I think we also need to be candid, and that is the Food and Drug Administration was trying to draw a very careful line: How do you, within the first amendment, continue to permit advertising to adults while restricting those forms of advertising that have the greatest impact on children? One of the reasons why it is going to be important for FDA to continue to have authority is that we need that type of research.

One of the benefits of legislation or a comprehensive plan is that it has built into it funds for research on exactly those sorts of questions, so that if you and I come together again in 4 years we will have solid data about whether the tobacco industry has been able to circumvent that rule as it affects kids.

Senator SNOWE. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Ford.

Senator FORD. Thank you, Mr. Chairman.

I am getting mixed signals here and I am trying and I have tried—everything focuses on me, you know, at meetings like this. It makes me nervous and I want to go outside and smoke a cigarette.

But everybody wants to keep the package. Do not want to lose the package, but you want to add on. And it is disturbing that you get around the first amendment with this agreement, in my judg-

ment, because, as we have talked, this has to be a protocol or a side agreement. It cannot be fixed into law.

So we are here saying that we want to stop all this advertising and the only way we can do it is to get the tobacco companies to agree. And they have agreed. Now we are worried about black and white, better known as "tombstone."

We talk about increasing the price. Well, I listened to Dr. Koop the other day and he gave four reasons why you cannot control teenagers or under-ages. He said if you can understand those four reasons you might get to them. And if you tell them know they will do it, is one of the reasons he gave, I believe.

Mr. Myers, as I understand it, you were part of this agreement. At least you participated in the negotiations, and I believe I saw you standing there and getting applause for all the hard work you have done to put it together when the agreement had been signed.

Now, is \$368 billion the total figure in your agreement or is that just the core tobacco settlement?

Mr. MYERS. I am sorry, Senator Ford. I am not sure I understand the question.

Senator FORD. \$368 billion over 25 years basically is the core agreement?

Mr. MYERS. That is correct.

Senator FORD. So there is add-ons in addition to that, is that correct, under the agreement that you participated in?

Mr. MYERS. The only add-ons were the penalty provisions under lookback, that I am aware of.

Senator FORD. Oh. What about the attorneys' fees?

Mr. MYERS. The attorneys' fees were outside the agreement.

Senator FORD. Well, well, they were a part of the agreement, though, that the attorneys' fees now will be paid by the defendant. And I am not worried so much about the attorneys right now, but the point is that when you add up the tort liability and when you add on the lookback and now you want to increase that, and then you worry about the attorneys' fees that are a part of the agreement, and now the lookback is, and the additional tort liability is, but it is outside of that \$368 billion.

So now that gets us up to about \$434 billion without attorneys' fees. And now we have got the \$2 billion annual increase in excise taxes. That is \$50 billion more over the 25 years. That gets us to \$484 billion.

Now we are going to increase the lookback and that could be another \$2 billion, and that would be \$22 billion over the 25. So we are at \$526 billion and we do not know what the attorneys' fees are going to be, or their cut of the deal is going to be.

Are we not getting close to, when you add up all those figures, are we not getting close to the \$1.50 a pack that everybody's talking about?

Mr. MYERS. You and I have obviously done this wrong. You and I are the only two that are not going to make any money off of this deal in any way, shape or form.

Senator FORD. No, you are getting paid to do what you are doing. I am getting paid to do what I am doing. So we are doing fine. I am going to give my job up. You have got an issue that will last

the rest of your life. I think that is part of the thing you have got here.

Mr. MYERS. Well, there is no one who has been a stronger advocate for the Congress of the United States taking this agreement and trying to come up with something comprehensive and meaningful that we can pass.

Senator FORD. You are on the verge of losing that, too.

Mr. MYERS. I think the critical question—and you and I would agree with this because we have worked off and on for years—is that there is a very difficult balance. If we are serious about doing something, we really have to make hard choices and try to move it forward. But it is too important for us not to do right, Senator, even if you and I may disagree about what the right number is.

Senator FORD. I understand that. Are you going to take my figures? Are you going to accept those or are you going to say that I am way off?

Mr. MYERS. I am not going to say either, because I have not gone beyond the number of the—

Senator FORD. Well, I will be more than pleased to give you my background here. That is \$526 billion plus. It is not \$368 billion. It is all on the industry, and the industry has to make up for that, and that pushes it to \$1.50 a pack.

Mr. MYERS. Senator, my concern is a very straightforward one.

Senator FORD. Mine is, too.

Mr. MYERS. And that is—

Senator FORD. I want to get this sucker over with before I sine die.

Mr. MYERS. I think both of us feel that way, and I am aging rapidly.

My goal is to make sure that what we pass will actually have a sustained and significant impact on tobacco use rates in this country, so that we can look back on what we have done with pride and a recognition that we have saved the lives of millions of Americans.

Senator FORD. I see my time.

Let me ask Ms. Igo. You seem to be sitting there. We jump on Matt a lot, and you are a nice lady and I want to give you an opportunity. In your testimony you point out the difficulty of separating advertising aimed at adults and advertising aimed at children. How would you make the distinction?

Ms. IGO. I think—well, I would not make the distinction unilaterally at this point. I think that that is an issue that needs to be discussed very thoroughly. I think that, much as we did with the television industry ratings, it has to be a meeting of the minds. I think there are some agreements that could be developed—I think it is an issue that has to be carefully considered and a response carefully crafted.

Senator FORD. Can you tell me what the difference between an ad aimed at children and an ad aimed at adults might be? Try to be as specific as you can.

Ms. IGO. The industry would and has argued that the Joe Camel ads were not aimed at children.

Senator FORD. I asked you what you would do.

Ms. IGO. I am going to say that in my opinion those ads were aimed at children, because of the cartoon nature of the person, of

the image. I think it is those kinds of things that need to be carefully delineated.

Senator FORD. What would be then the ad toward the adult?

Ms. IGO. I guess if we are talking under 18 and over 18—

Senator FORD. We are talking about over 18.

Ms. IGO. I would say that those ads that do not use the images that appeal to children, which are those images that are based on their own self-image, what they want to be, what they think is cool. Those are the kinds of images and advertising that research and the information that I have read indicate that young people are attracted to. There is a lot of research out there that tells us what encourages children to respond to advertising, and much of that has been done on the tobacco industry.

I think that that research is available to us and I think we can craft those decisions based on that research.

Senator FORD. Do you agree with me that regulating the content of the ads would have to be an agreement by those who advertise, rather than a constitutional question?

Mr. MYERS. Let me help out on that, both as a lawyer, a former civil rights and civil liberties lawyer, and someone who has looked at this question very closely.

Senator FORD. And still has black hair. I do not understand it.

Mr. MYERS. Going quickly.

I think the agreement that was entered into with the tobacco industry could probably withstand constitutional scrutiny because of its focus and intentional focus on advertising that has the greatest impact on young people. I think honesty also requires that a number of the provisions have never previously been tested, and it is for that reason that the State attorneys general and the tobacco industry entered into an agreement to say that those provisions would also be included in consent decrees, so that we would be sure that we get what we bargained for.

There is a great deal of evidence about the type of advertising that has the greatest impact on children. It is the type of images that I have shown you today.

Senator FORD. But to go back to the Greensboro decision, the judge there, who knew the Nation would be focused on him, threw out advertising requirements of FDA without even referring to the Constitution. He said they did not even have the authority, so he did not even make the constitutional step.

Now, Mr. Myers, I think that you and I both agree that there will be a very difficult decision by the Supreme Court, and it will go there, if you start regulating content.

Mr. MYERS. Senator Ford, two quick responses. You are correct, the judge in Greensboro ruled that FDA lacked statutory jurisdiction. Neither he nor anyone else has yet ruled on the constitutionality of the FDA rule. I do not have a crystal ball to know how either the Fourth Circuit or the Supreme Court would rule.

One of the purposes of the agreement for certain was to nail down the authority of the FDA in this area and attempt to come up with a set of rules that have the best possible opportunity to work.

Senator FORD. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Burns.

Senator BURNS. I have not really made up my mind on this, but there is a couple of questions I want to ask. Would it surprise you—and I was very interested in the question of Senator Ford—that selling any product, any product from shoelaces to trucks, the ad on television and usually the display ads, where do you think they are directed?

Mr. MYERS. I think advertising serves multiple purposes. It would be a lengthy discussion. Part of the purpose is to expand the market, to attract new users. Part of the purpose is to switch people from one brand to another. And part of the purpose is to cause a spontaneous action of purchasing when you might not otherwise be thinking of doing it.

Senator BURNS. And when they are putting those ads together, display or whatever, it is usually aimed at about a fourth or a fifth grade education.

Mr. MYERS. I cannot speak one way or the other on that.

Senator BURNS. Well, I can tell you, I can, because I was in that business in the radio and television and sold time and produced time. And that is why I think it will be very, very difficult to make the judgment on what Ms. Igo says, whether we have got ads aimed at children or are we aiming at adults at selling anything.

And I would ask, Ms. Igo, in this whole thing, if we go through the process of this—and I think it is a very important process and a process that we have to go through. The Government is being asked to do something here, and I would ask you, what is the role of the individual in this country? What is the role of the parent?

Ms. IGO. The parent is the primary concern—the parent's primary concern is their child, and the parent has a primary concern to protect that child. Our association has through the years utilized that parental concern in countless campaigns to educate both young people and their parents about the dangers of tobacco. That continues to be our focus.

However, we are looking at the conditions of this settlement, particularly the marketing, as one tool that will enable us as parents and as concerned community people to tread a more level field in what we say to our children. We can say and we do say, and we have put out countless reams of materials to both children and adults concerning the dangers of tobacco and its use.

However, when you balance that against the kind of multi-million dollar, billion dollar campaigns that the industry is able to put up on the television and on billboards and in print ads, we are not able to combat that kind of advertising. And I would tell you that we will not stop our part of the campaign to educate our children and our parents.

Senator BURNS. I do not think you should. But how many instances have you ever seen in a family—now I am just talking about a guy out here that lives in the neighborhood and goes to work every day, because that is kind of where I come from—is that if you see a young person smoking cigarettes, how often do you see that he or she is smoking the same brand as their parents are?

Ms. IGO. I would not disagree with you that there is a patterning, but I think the research that I have read indicates to me that peer pressure is a greater indicator of what brand a young person

smokes as well, and then followed by advertising. And if I am wrong I am sure Matt will correct me.

Mr. MYERS. You are 100 percent right. Senator, 40 years ago the data showed exactly what you suggest, and that is the best predictor of which kids would smoke was whose parents smoked and the best predictor of which brand they would smoke would be their parents.

It has changed today, and tobacco advertising has contributed to that in a very significant way. Kids smoke in packs. Kids are both fiercely independent and totally part of the pack. The advertising that we see creates a culture, an attitude and an atmosphere about particular brands that makes those brands appealing to those kids who want to be fiercely independent and at the same time just like everybody else.

That is in part the way that advertising works here. It makes it much more difficult for you and I as a parent to sit down with our kid and say that this product over here really is not about the transportation from childhood to adolescence to adulthood, it really is not about the rugged individual or staying slip. That is why in order to free up parents to have that discussion we need to begin to eliminate those billions of dollars that are changing their attitudes in ways that are outside our influence.

Senator BURNS. That is all I have. I think there is a role for the individual here, although I am going to support this settlement very strenuously, because I think we are confronted with a situation here where children should not smoke or use tobacco products, even though I occasioned the evil habit myself.

Thank you very much.

The CHAIRMAN. Senator Bryan.

Senator BRYAN. Thank you very much, Mr. Chairman.

Mr. Myers, Ms. Igo, thank you very much for some very compelling testimony. Mr. Myers, your premise has been that the negotiated settlement, although flawed, is the vehicle that we should proceed with and we should strengthen the provisions of that settlement agreement. Is that the essence of what your recommendation is to us? I am giving you the shorthand version.

Mr. MYERS. It is the essence. The real bottom line of my testimony, however, is we have an opportunity for bringing about fundamental change. Whether the format is the settlement or some other format, the key measure is whether we take some action that will most dramatically, most rapidly, and over the most long run reduce tobacco use among kids. I will support whatever that is.

Senator BRYAN. And I appreciate that.

Let us talk about specifics if we may. Specifically what provisions in the settlement agreement ought we to strengthen? And I am not asking you to cast it in legislative language, but give us enough specificity and the priorities that you would attach to those recommended changes, rank them one, two, three, four, five. If you have got more than that that you are wanting us to consider, I would welcome that as well.

Mr. MYERS. Well, what I invite is the opportunity, not just for my organization but for other public health organizations, to work closely with you and in setting those priorities. It should not be a single individual or a single organization.

Senator BRYAN. No, but you are our witness this morning.

Mr. MYERS. No, I understand. I was about to answer your question. I was not going to duck it, do not worry.

There are a number of things that leap out at us. Certainly top priority from my perspective is that FDA's authority to act must not be diminished in any meaningful way and in fact, given the district court's decision on advertising, needs to be enhanced in a thoughtful way.

Second, since it is clear that the tobacco industry will find a way to circumvent any set of rules that we come up with, the concept of the lookback provision needs to be built upon. The data needs to be developed so that the penalty is large enough to actually disincentivize the industry, but reasonable enough so that we can enact it into law. The goal is not to punish, it is to change behavior. I think that is fundamentally important.

Third, we need to look at the provisions carefully that relate to the disclosure of internal tobacco industry secrets in the narrow area that relates to health, addiction, and marketing to kids. This is not about finding out about trade secrets. This is not about competitive advantage whatsoever. It is ensuring that we have the information to make sound public policy decisions.

And we need to come up with a way to recognize the unprecedented requests that are being made about waiving attorney-client privilege. That is not something that should be done willy nilly or easily, and there is a very difficult and very careful balance there that has to be addressed.

Fourth, we need to be sure that enough money is going into public health-related purposes and research-related purposes to ensure that we can carry out our job over the long run, and therefore we need to examine the numbers in the document to ensure that that works and works well.

Senator BRYAN. You are talking about of the \$368 billion?

Mr. MYERS. That is right.

Senator BRYAN. OK.

Mr. MYERS. Or any other number that some other human being should—

Senator BRYAN. You are talking about reprogramming perhaps what—

Mr. MYERS. What I am saying is we need to examine it carefully. We need to get the opportunity for the input of the executive branch and other branch agencies that are affected to ensure that the numbers chosen were adequate. For a variety of reasons, their input—it was impossible to obtain their input in the process, so best guesses were made. As I said, no one should be so cocky as to think that they know all of those answers on those issues.

We need to ensure that as we look at the agreement that we do nothing that makes the tobacco epidemic internationally worse, and we need to challenge our Government to do better. The World Health Organization is currently considering an international convention to impose worldwide rules so that our children are now protected, but children in poor African nations are not protected. It would be terribly myopic to look narrowly within the border.

On the other hand, we ought to appreciate the complexity of that issue as we are dealing with legislation, and that is an area that

needs careful discussion, not rhetoric. And I frankly think it is an area where the administration needs to be challenged to do substantially more.

I am doing this as a stream of consciousness, so I may have missed something. But I think I have hit the highlights for you.

Senator BRYAN. And I appreciate that. That is very helpful.

Now, you were suggesting, with respect to the latter, that that should be accomplished within the framework of this agreement that we are going to be asked to—

Mr. MYERS. On the international issues? I am not necessarily suggesting that. I am saying to you, as we move forward within the framework of any legislation we ought to be sure that we do no harm. Cardinal principle, do no harm. Make sure nothing we do makes the situation worse elsewhere. And No. 2, we ought to begin the discussion about how we do some good.

Senator BRYAN. It sounds like the Hippocratic Oath.

Mr. MYERS. In some ways it feels that way.

Senator BRYAN. Ms. Igo, let me ask you a question. I totally agree with the thrust of what you and Mr. Myers have said in our effort to focus on children, the devastating consequences. I know this may be politically incorrect, but I need to find out what the rationale for this is. With respect to the attempted purchase or possession of alcohol, since the beginning of recorded civilization there have been some restrictions imposed upon the young person who violates the provisions of the law that says you cannot drink until you are 21.

Possession of alcohol by a minor in most, if not all, States is a violation of law, treated as a juvenile offense if the individual is under the age of legal majority, and an attempt to purchase alcohol by an under-age person is also subject to penalty provisions.

I have scanned the provisions as provided here in the comparative analysis of the FDA's pending regulations and the proposed settlement and what Dr. Koop and Dr. Kessler in their own very thoughtful analysis have provided. I find nothing that would suggest that the young person who is involved ought not himself or herself be a part of some kind of penalty structure.

I am not talking about certifying and making those adult offenses. Maybe you can enlighten me as to whether I have missed that, or what is the rationale for not as part of this multifaceted approach that you have all suggested in a very, very persuasive fashion—why should we not include those provisions as well?

Ms. IGO. I will speak to you as a representative of the National PTA and indicate to you that our association has no position that would allow us to support penalties imposed upon young people in this instance.

Senator BRYAN. With great respect, and I understand that is your position and you are here to testify and represent that position, what is the rationale for that? Help me to understand? I am certainly not suggesting that that should be in lieu of all of the other things that Mr. Myers and you and others have worked on. But I must say that I am absolutely baffled as to why all of a sudden that is verboten. That is so politically sensitive. We do not dare suggest that young people themselves ought to at least bear some responsibility for the actions that they take.

Ms. IGO. Our association believes that the primary focus of this settlement is and should be on the provider of the tobacco product.

Mr. MYERS. Senator.

Senator BRYAN. Mr. Myers. And I appreciate the chair for allowing me to go a minute over. I apologize.

Mr. MYERS. Could I give you a quick response?

Senator BRYAN. Yes, I would appreciate that.

Mr. MYERS. That is, the reason that you do not find it in either the Food and Drug Administration rule or this agreement is that all too often in the past those who market and sell tobacco products have tried to shift the blame from themselves to children. It has been used as an excuse for inaction. I think that is the reason that you find so many health advocates leery of it here before we come up with a comprehensive solution for solving the problem from the other end.

Critically, neither the agreement nor the FDA rule inhibits the ability of a State to take any sort of action that it deems appropriate, including the sort of action that you are suggesting.

Senator BRYAN. Should that not be part of the package, Mr. Myers?

Mr. MYERS. If you have a full-scale package, I think it should be part of the debate. As I said, it is clearly a controversial issue, and the reason is it has been used as a scapegoat issue up until now.

The CHAIRMAN. Senator Frist, Dr. Frist.

Senator FRIST. Thank you, Mr. Chairman.

Ms. Igo, the settlement right now provides, I believe, about \$200 million annually for education, \$500 million for media. Without focusing too much on the numbers, I do want to ask your perspective on school-based programs. Based on your experience and your conversations with others, which of the school-based programs work and which do not seem to work, and how good is the data?

Ms. IGO. I would not give you an overall answer as to which programs work and which do not. It depends on a number of factors that influence that. All of them can be effective if in fact there is community, parent, teacher commitment to those programs, if they are administered in ways that involve young people in the decision-making. I would not give you a definitive answer there.

Senator FRIST. Mr. Myers, in your review of the school-based programs, without sort of expanding into other programs, is there great potential for the school-based programs for reducing underaged use?

Mr. MYERS. The best data that I have seen, and there is a good discussion of it in the 1994 report of the Surgeon General as well as a number of other comprehensive analyses, is that a school-based program is most effective if it is a part of a comprehensive community effort that reaches beyond the school as well. Too often, our kids learn one thing in the school and then walk out the school door and see a whole bunch of different behaviors and cues.

The data shows as part of a broader-based program a school-based educational program can contribute significantly to children's awareness, understanding, and affect the behavior, their behavior.

Senator FRIST. Is the ratio of \$200 million for education annually versus \$500 million for media, is that a good ratio? Should we invest more heavily in our school-based programs?

Mr. MYERS. Let me first try to explain to you some of the rationale behind what was there. And I am not sure about your \$200 million figure, but let me accept that for the moment. The goal there was to put more money into school-based and other direct hands-on education programs than has ever been done before.

It was also designed not to be stand-alone. But it was my understanding that the State attorneys general with money that was going back to the States intended in many circumstances—and it would depend on the State ultimately themselves—through their own States to increase the level of State level activity on those issues. They believed that it best be done through local decisionmaking to the extent possible.

So we did not see the money to the Federal Government being the sole answer to that. This really was designed to be a Federal-State partnership, with as many enforcement tools, educational tools being done at the lowest possible local denominator.

Senator FRIST. Thank you.

Ms. Igo, when people think of the dangers of smoking, people think to the Surgeon General warning and today many people think back to Dr. Koop and his stance against smoking as well. Today we do not have a single strong voice. We have seven committees right now in the U.S. Senate looking at the settlement. We have a number of people that are getting more familiar to the Nation's people, to the people of the Nation broadly. But we still do not have that single strong voice that people associate with the issue.

For young people, again based on your experience and talking to other members of your organization, is that important?

Ms. IGO. To have a single strong voice? My association believes strongly in local options, in local development of programs. I think we have seen it work effectively for my organization to be able to craft their own campaigns, their own programs, using the information available from the numerous sources that we have available to us.

In this country, especially among parents and teachers and young people, that seems to be the feeling with which we are most comfortable working.

Senator FRIST. Mr. Myers, who is the single voice in the Nation that is recognized on the issues that we are talking about? It used to be the Surgeon General.

Mr. MYERS. I think I agree with you, one of the things that has concerned a number of us is that there has not been. I do not know that there needs to be "a single voice," but there needs to be strong, visible voices that young people and adults alike look to with respect. That is something that we need to work at.

Dr. Koop played that role in an unparalleled manner during his tenure and still remains a very visible voice. But we need to have other voices as well for young people to look to. They need to come from multiple communities, not just from government and the medical profession, but from the sports world and other places where young people look for role models.

Ms. IGO. Senator, I would just say I think the message that we have heard, especially in the recent years, has been a central, uni-

fied message. I thought your question was more around the different programs and campaigns.

Senator FRIST. Let me ask you both very briefly, what does not work? I think it is very clear there is not a silver bullet and, Mr. Myers, you have made that point very clear. It is everything coming together, and I guess as you look at the settlement and you look at the fact that you are trying to address the fundamental problem right now, eliminate, reduce youth smoking—what specifically does not work in campaigns to reduce smoking?

Obviously everything does not work, and obviously we can address it from all different angles. But specifically what has been found to not work in campaigns to reduce youth smoking.

Mr. MYERS. The negative is always hard. Let me say, one has to put boundaries on what you say because of the limits of it. There have certainly been educational campaigns where the campaign is seen as adults telling kids not to do something because it is harmful to them. Kids do not respond to that, and public education campaigns that do that have not had a great deal of effect.

We have seen internationally in one or two public education campaigns that when they so narrowed their focus that kids thought that adults were talking down to them, you saw—I cannot say that you saw a negative effect, but you did not see much of a positive effect.

We have seen some studies in school-based educational programs where the school-based educational program was not surrounded either by a community activity or changes in behavior and cues outside the school, where it was very difficult to measure an impact on kids' behavior, not necessarily their knowledge but on their behavior, as well, so that those programs in isolation have not been shown to have a significant or substantial effect.

I guess the other thing that I would say to you is, if you take out any one component and isolate it and you did research on it, you would have a hard time showing that it by itself could produce a dramatic change in behavior. Youth access is a very good example. There are studies out there that show that when you actually increase the enforcement of laws so that it is virtually impossible, so that kids fail 9 out of 10 times, you do reduce consumption among kids.

But there are other studies that show that if you just fall a little bit below that area and do nothing else, that you do not have an overall effect on consumption because, you know, it is like the balloon: If you squeeze it here, the kids will go there, unless you have also dealt with the surrounding community or unless you have also dealt with what makes tobacco products appealing to kids.

That is why I am a broken record on the notion of we cannot separate out these things and do this little thing and expect it to have a long-term major effect.

Senator FRIST. Thank you.

Ms. Igo, do you have any comment?

Ms. IGO. I would just indicate to you that where the young people themselves have not been involved in the campaigns, that has seemed to me and to our people to have been a leading indicator of an unsuccessful attempt.

Senator FRIST. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

I was struck by what I thought was a good point that Senator Bryan made about the responsibility of children. You know, a lot of what we call children in fact act very much as adults. They are treated that way increasingly by the juvenile justice system.

I can remember, I was a Governor for 8 years and every year I tried to raise the drinking age from 18 in West Virginia to 21, and in 8 years I was able to do it only to 19. Then I came to the Senate and there was a highway bill and the Congress decided that if a State wanted its highway bill they had to put their drinking age to 21, and it was done in 10 minutes.

I think there is a parallel between parental responsibility, which I think is probably mixed in this country at best—that is, the parents' willingness to take on the responsibility on a sustained basis—and the child's responsibility, especially when that child is a teenager and moving upwards.

So I think it is an interesting point you raise, that children have a responsibility in this and to leave them out simply because the tobacco companies were trying to shift the blame to the children is probably not very good reasoning, and that children should accept some legal responsibility, as they do in drinking, for acts which may in fact—I have no idea of the effects of the deadliness or the damage caused by drinking as opposed to smoking. I do not know how those compare, but they certainly have to be within eyesight of each other. I just make that as a statement.

I have two questions. One is—well, basically one. We had a terrific argument in the veterans community about whether or not we should allow veterans to have smoking rooms in veterans hospitals, and we finally decided that, yes, we should, because the U.S. Government had given out, particularly to a lot of those who are now beginning to pass on, had given out in World War II, et cetera, had given out cigarettes. I mean, that was one of the things you always saw in John Wayne's mouth.

So there are places to smoke in veterans hospitals, and that was a long argument, but I think it was settled in the right manner. These are people who had been encouraged by the Government, who were in their seventies and eighties, et cetera, and to just sort of yank them off—

What I cannot understand, Ms. Igo, is the fact that schools, so many schools, also are allowed to have places where students can go and smoke—unless I am completely wrong.

Mr. MYERS. They cannot do that any more in this country.

Senator ROCKEFELLER. Is that universal and national?

Mr. MYERS. Yes, sir.

Senator ROCKEFELLER. There is no place for them to go?

Mr. MYERS. There is not supposed to be.

Senator ROCKEFELLER. Now, that is very interesting, because that means that students as well as teachers can go through the period of a day without smoking, because they have to.

Well, let me then move on to my second question, where I hope my facts will be more straight, and that is the question of smoking between the ages of 18 and 25, or 19 and 25. First, as you work

on children up to the age of 18 through various anti-advertising, these agreements, however they come out, is there any carryover? How long is there a carryover in the effect of campaigns against smoking to those who are 18 to 25?

And second, what are the statistics on those between 18 and 25 and terms of increased usage or decreased usage of tobacco, and what should we be doing about that as we sort of constantly discuss young people?

Mr. MYERS. Let me try to give you a couple of quick responses. No. 1 is, the best data in this country—and it is a continuous stream of data on this—shows that if we can get kids to the ages of 19 and 20 without smoking, a very small percentage of them will start thereafter. 90 percent of the people who start smoking do so as teenagers or younger. Among the 10 percent currently who start older, the data also shows they tend to quit sooner. That is part cultural, it is part that we have finally gotten them through adolescence and they are beginning to understand they may actually die some day and begin to worry about risk-taking behavior.

So that just getting them to that point goes a long way toward solving the problem.

No. 2, we would be making a mistake if the public education efforts that result from either this agreement or anything else we do focused so narrowly on kids. The reality is what we need to do is use those public education funds to do broad-based messages about tobacco use. The reality is tobacco use is not any better for an adult. It is just that it is kids who start.

With adults we need to use different mechanisms. We need to educate, help them quit, and that is different in some respects than how we look at it with kids. But we need to be doing both. The reality is that we ought to be doing everything we can to discourage anyone, no matter what age they are, from using tobacco because of its ultimate harmful effects.

Senator ROCKEFELLER. Do you agree with that?

Ms. IGO. Yes.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Ford, do you have any further questions or comments before we move to the next panel?

Senator FORD. Just one thing. I would like for Ms. Igo to think through this a little bit. You said that, just take the cartoon characters out and that would not attract teenagers or under-aged in the advertisement. What are you going to do about the Pink Panther when he goes around with fiberglass? Now, that is directly to adults. You are not going to sell much fiberglass to young people, the insulation.

I think you have to be careful. This is what we are all talking about, that fine line we get into. I do not want an answer. I just want you to think. You have seen the ad.

Ms. IGO. Yes, sir.

Senator FORD. Oh, he is all over the place, and he is pink and he is a panther. I think my grandchildren, if you ask them about that, they would know as much about the Pink Panther as they would anything else.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Myers, Ms. Igo.

Mr. MYERS. I want to thank you all for the opportunity of testifying. You know, we were asked what does not work, but it is clear that things do work. Our organization recently issued a set of data on each State showing the number of kids in each State who smoke. What it does show you is that, if you look at the tobacco control policies in those States, there is a correlation between the number of kids who start using these tobacco products.

So when you look at this agreement and the set of public health policy initiatives, there is something we can do. We really do have the opportunity to make a difference in how we do that. I think both of us have a final message, is it is time we get on with the task of coming up with the best possible set of rules and regulations we can to make that happen sooner rather than later.

Thank you very much.

The CHAIRMAN. Ms. Igo.

Ms. IGO. I would just repeat that I believe the focus has to be on children. It has to be on their health and it has to be on those things that concern them. I think that where we are today is an opportunity to begin to craft some provisions that will address this problem. Our association of parents and concerned community people have had this as an issue since 1926. We will continue to have it as an issue whether or not this settlement goes through. However, I would tell you that, as a parent, as an advocate for children, this is your opportunity to make a difference for children.

Thank you.

The CHAIRMAN. Well, I want to thank you both, and I want to assure you of our intense desire to get this issue resolved as quickly as possible. It is very easy, in all due respect, to make an agreement that has to be turned into legislation which is under the oversight and responsibilities of a variety of committees of Congress, which immediately is severely criticized by two of the most respected people in America, Dr. Kessler and Dr. Koop, and many other organizations we will hear from in the next panel.

I believe, in all due respect to your answers to my first round of questions, that we are in agreement. We have to move as rapidly as possible, but at the same time we cannot move too rapidly, and that is the dilemma that we face here in addressing this issue. I know you appreciate it because I live it day to day.

But I hope you also understand that there is no lack of willingness in my view on the majority of the U.S. Senate. I think I speak for my colleague from Kentucky as well, what has, as you know, deep and abiding concerns because of a variety of reasons, including the farmers that he represents. But we also do not want to fashion a piece of legislation that after it is passed by both houses of Congress and signed by the President of the United States did not achieve the goal that we pursue and which has been so well articulated by you here and on other occasions.

So I appreciate what you have given us today. We intend to move forward.

Senator FORD. May I—I apologize for interrupting, but the chairman makes some awful good statements here. Let me just go back and I want to show you where we are placed in that. Dr. Kessler

said, after the FDA rules were signed by the President and put into place, I stand by the rules we put into place and maintained that the provisions of the FDA rules are enough to accomplish the goal of reducing teen smoking by 50 percent in the next 7 years. Now, that was the rules that were put into place.

Now Dr. Kessler says that the only way to reduce youth smoking is to dramatically increase the cost of cigarettes and to fund anti-smoking campaigns. Now, we are put in the position of, the leadership that was appointed by a Democrat and a Republican, out here that we all talk about as leaders in the field, and we get conflicting statements. It makes it difficult for us to say who is honest, who is dishonest. We do not think anybody is dishonest, but we are put in that position.

The chairman is absolutely right, I want this sucker taken care of, and I think the sooner the better, because if you want to stop youth smoking you better get after it instead of continuing the issue.

The CHAIRMAN. I thank my friend from Kentucky.

Mr. Myers, Ms. Igo, I would be glad to let you respond as soon as I finish, just 1 second.

So I want you to be assured that this is the highest priority of this committee to exercise our specific oversight. We do not intend, as I said at the first hearing, for us to be involved in other areas. Those are for other committees—the Judiciary Committee, the Agriculture Committee, the Environment and Public Works Committee, and even the Indian Affairs Committee.

But I want to assure you that it is our highest priority. I know of no more compelling issue before the Congress. And yet I have got to say, when the President of the United States does not give us a specific legislative proposal that is not helpful either. Look, I understand why the President of the United States is going to come down as he did today. But it is an indicator, and I am not particularly being critical. I am just saying it is an indicator of how difficult this issue is.

In respect to Dr. Kessler and Dr. Koop, we will have another hearing and we will have them up before us again, I say to my friend from Kentucky, because I think there has been some evolution in all our thinking on this issue since this agreement was made, and that evolution has partly taken place because of the information that we received from you and the active participation in this national debate that we have been involved in.

Mr. Myers, Ms. Igo, you are welcome. And again, I do not like to take a lot of time on this committee, but I think this is of sufficient importance that it warrants it. Mr. Myers.

Mr. MYERS. I want to say two things. First, I want to praise the committee for the thoroughness with which you are doing this. I do not say that lightly or just as a matter of courtesy. I think the discussions both during the hearing and leading up to the hearing have been extraordinarily fruitful.

Second, no one has said this is going to be easy. We will only succeed here if all of the major participants agree to work together to craft a solution that works for everybody and that puts in place a policy that really will make a difference. We offer to assist in any way possible that we can in making that happen.

The CHAIRMAN. Ms. Igo.

Ms. IGO. I would concur with Matt's statements and add that we, as we did in our testimony, offer to work with any appropriate parties to make this work for the children.

The CHAIRMAN. Thank you. And again I want to state, the committee is aware of the absolute criticality of working very closely with you as we address this issue. I thank the witnesses.

Our next panel—and I am very appreciative of their patience—is Dr. Alfred Munzer, who is the past president of the American Lung Association; Dr. Joseph DiFranza, who is of the University of Massachusetts Medical Center; and D. Scott Wise, who is a partner of Davis, Polk and Wardwell, 450 Lexington Avenue, New York City, NY.

I want to thank the witnesses for their patience and again point out that—Dr. Munzer. Dr. Munzer, I understand that you have to leave early, so perhaps we can adjust the committee a little bit. So we will accept and go forward with your testimony and any questions that we might have for you, and then if I could ask the indulgence of the other two witnesses, if we could proceed in that fashion due to the fact that I understand you have to treat patients, which, as important as this hearing is, is transcendent.

Please proceed and welcome, Dr. Munzer.

STATEMENT OF ALFRED MUNZER, M.D., PAST PRESIDENT, AMERICAN LUNG ASSOCIATION, AND DIRECTOR OF CRITICAL CARE AND PULMONARY MEDICINE, WASHINGTON ADVENTIST HOSPITAL, TAKOMA PARK, MD

Dr. MUNZER. Mr. Chairman, Members of the committee: I am Dr. Alfred Munzer, past president of the American Lung Association. I am also director of Critical Care and Pulmonary Medicine at Washington Adventist Hospital in Takoma Park, MD, where I specialize in treating diseases of the lung. I have 15 patients in the hospital right now and 14 of them have diseases directly attributable to smoking.

I am here today to speak on behalf of the American Lung Association. I wish I could tell you that the proposed tobacco deal is basically sound, that the compromises are fair, and that the tobacco industry has changed and can now be trusted to do what is right. Unfortunately, none of this is true. We urge Congress to throw out the proposed deal. Our experience tells us that this is a sweet deal for the tobacco industry and a bad deal for the American people.

The deal is especially bad for our children. For them it simply achieves too little. For people elsewhere in the world, it means even more death and disease.

The American Lung Association has looked closely into the advertising and marketing aspects of the tobacco deal. A few months ago we consulted with some experts in advertising and marketing to provide the American Lung Association with advice and counsel regarding the settlement provisions. We asked for a review of the loopholes of the agreement: What would advertising look like if the settlement agreement were in place? We also asked for advice on the development of actions that would successfully diminish the power of tobacco advertising among teens and children.

While the tobacco industry may in fact give up some of its most important visual icons, like Joe Camel, we believe the industry did not give away its ability to attract kids to cigarettes through advertising. I call your attention to this particular advertisement. It does not contain any human or cartoon images. However, our expert tells us that the imagery of the motorcycle and the expression "Live Out Loud" are very appealing to children and teens.

We understand that this type of ad will be permitted in so-called "adult" magazines, those magazines that have less than 15 percent youth readership or less than 2 million youth readers, under the proposed deal, including Time, Newsweek, Family Circle, and Popular Mechanics.

Mr. Chairman, the American Lung Association endorses the Koop-Kessler Commission advertising and marketing recommendations. To achieve the Koop-Kessler goal of no advertising directed to people under the age of 18, we recommend the following:

All tobacco advertising visuals accepted in publications for over-18 audiences should be limited to black and white ads showing only the product package. No props or scenery of any kind should be allowed. Except for the warning label, no copy should be allowed.

All publications that accept tobacco advertising should be required to conduct annual readership studies showing the percentage of readers under age 18. Those with an under-age 18 readership of more than 15 percent or 1 million should be prohibited from running tobacco advertising or announcements of tobacco marketing or promotional campaigns.

The Koop-Kessler Advisory Committee makes excellent recommendations for banning direct and indirect payments for tobacco product placement in movies, TV programs, and video games. The American Lung Association additionally recommends an end to payments to entertainment and sports figures to smoke in public or in the course of their professions, such as live music performances.

Another important health-related provision of this deal relates to document disclosure. The American Lung Association believes the document disclosure provisions of the proposed settlement represent nothing less than an attempt by the industry to avoid making public the materials that relate to public health, medical research, marketing and advertising, consumer fraud, potential criminal activities, antitrust violations on the part of the tobacco industry.

We are told that if the industry is forced to disclose those documents, they will abandon the settlement. They must be hiding some awful secrets if they are willing to abandon a deal that serves them so well.

The American Lung Association also is concerned about immunity or civil justice issues. Under the agreement, the tobacco companies will be immune from punitive damages. State laws will be preempted. The tobacco companies will also be immune from disclosure of potentially revealing documentary evidence of their past actions. Finally, the tobacco companies will be immune from consolidated litigation.

If these three provisions become reality, successful litigation against the tobacco companies will be highly unlikely, not because

the evidence will be suppressed, but because the economics of successful litigation will be eliminated.

The precedent is awesome. To think that this industry, which may have committed the most egregious and deliberate acts against the health of their consumers, may be insulated from punishment raises the question, what kind of conduct should be held to a higher standard of economic damages?

Mr. Chairman, some would have Congress believe that this deal is the only or best chance we have to curb the scourge of tobacco. When someone tells me I have to buy today because a deal this good will not last, I get very suspicious. The proposed deal is inadequate in so many ways that there is little to redeem it. Before Congress rushes to enact a deal negotiated in back rooms, it should fully examine the consequences.

Only the tobacco industry fears going to court. When Minnesota goes to trial in January and all the documents are finally released, the American people will more fully understand the nature of the tobacco industry's wrongdoing.

We urge you to be cautious and patient and to explore the best ways to protect the people, especially the children of this Nation and the world, from the health hazards of tobacco use.

Thank you for the opportunity to testify on this very important aspect of the proposed tobacco deal.

[The prepared statement of Dr. Munzer follows:]

PREPARED STATEMENT OF ALFRED MUNZER, M.D., PAST PRESIDENT, AMERICAN LUNG ASSOCIATION, AND DIRECTOR OF CRITICAL CARE AND PULMONARY MEDICINE, WASHINGTON ADVENTIST HOSPITAL, TAKOMA PARK, MD

Mr. Chairman, members of the committee, I am Dr. Alfred Munzer, past president of the American Lung Association. I am also Director of Critical Care and Pulmonary Medicine at Washington Adventist Hospital in Takoma Park, Maryland, where I specialize in treating diseases of the lung. I am here today to speak on behalf of the American Lung Association, the oldest voluntary health agency in America. The American Lung Association was founded in 1904 to fight tuberculosis and for more than three decades we have led this nation's efforts against the death and disease caused by tobacco.

I wish I could tell you that the proposed tobacco deal is basically sound, that the compromises are fair and that the tobacco industry has changed. Unfortunately, none of this is true. We urge Congress to throw out the proposed deal. Our experience tells us that this is a sweet deal for the tobacco industry and is bad deal for the American people. The deal is especially bad for our children; for them it simply achieves too little. For people elsewhere around the world, it means even more death and disease.

We have stood toe-to-toe with the tobacco industry all over this nation, from the U.S. Capitol to state capitals to city halls. We have learned, sometimes from serious mistakes, that when you negotiate with the tobacco companies you get burned! Those who negotiated this deal with the tobacco industry are now learning the same lesson.

Last month, the Associated Press polled the American people on this issue. I think it is always important for Congress to look beyond the polls and do what is right for America, but polling can be instructive about the public's perception at a given moment in time. Congress should listen to what its constituents are saying. Sixty-seven percent of those polled think that under the settlement, tobacco companies will sell as many cigarettes as ever in this country. This means the public doesn't think this deal will change the way the industry does business.

Fifty-four percent don't think the settlement is worth banning class action lawsuits. Fifty-eight percent think the government should control the level of ingredients, such as nicotine, to make cigarettes less addictive. Most importantly, AP found that 70% of the American public thinks that the price of cigarettes needs to increase by more than \$1 per pack to keep a significant number of young people from becoming smokers.

The American Lung Association is not alone in calling this a bad deal. In June, the American Lung Association joined other public health organizations to form the Advisory Committee on Tobacco Policy and Public Health, chaired by former surgeon general C. Everett Koop and former Food and Drug Administration head David Kessler. More than twenty other health organizations participated on the committee and unanimously endorsed the final report. The strength of the Koop/Kessler report is its very premise. Drs. Koop and Kessler did not ask us to come up with recommendations that are acceptable to the tobacco industry. The committee did not ask the industry for permission to regulate it. Drs. Koop and Kessler challenged us to determine what is necessary to combat the addiction, disease and death caused by tobacco. Mr. Chairman, I have appended a copy of the Koop/Kessler report* and I urge the committee to follow these recommendations in crafting any legislation. The Koop/Kessler committee recommends that tobacco policy in America must do the following:

- affirm the FDA's authority to regulate tobacco products;
- eliminate the sale and marketing of cigarettes to children by levying tough penalties on the manufacturers;
- curtail marketing, advertising and promotion directed at our children;
- eliminate exposure to secondhand smoke;
- disclose all tobacco industry documents;
- promote tobacco control worldwide;
- protect the legal rights of those affected by tobacco; and
- vigorously educate the public.

Like the Koop and Kessler committee, the American Lung Association consistently has opposed the proposed deal because it fails to achieve meaningful public health protections and it gives far too much to the tobacco companies.

The American Lung Association has looked closely into the advertising and marketing aspects of the tobacco deal. A few months ago, we consulted some experts in advertising and marketing to provide the American Lung Association with advice and counsel regarding the settlement provisions. We asked for a review of the loopholes in the agreement. What would advertising look like if the settlement agreement were in place? We also asked for advice on the development of actions that would successfully diminish the power of tobacco advertising among our teens and children.

While the tobacco industry may, in fact, give up some of its most effective visual icons, like Joe Camel, we do not believe, and we can demonstrate, that the industry did not give away its ability to attract kids to cigarettes through advertising. I call your attention to this advertisement. It does not contain any human or cartoon images. However, our experts tell us that the imagery of the motorcycle and the expression "Live Out Loud" are very appealing to children and teens. We understand that this type of ad will be permitted in so-called adult magazines—those magazines that have 15 percent or less youth readership or less than two million youth readers—under the proposed deal, including *Time*, *Newsweek*, *Family Circle* and *Popular Mechanics*. Like the Koop and Kessler committee, we demand more comprehensive restrictions on advertising to keep this sort of "stealth" advertising from reaching children.

The American Lung Association found that the advertising requirements in the proposed settlement, as written, will not appreciably inhibit the tobacco industry's ability to influence the 12- to 17-year-old segment of our population. In fact, the settlement's ban on the use of human images and cartoon characters in tobacco advertising and promotion would be a *mere inconvenience to the tobacco industry*.

The theory behind the proposed deal's advertising restrictions is that if people or cartoon characters with whom young people identify are eliminated from cigarette advertising, cigarette advertising will cease to be effective in reaching a youth audience. In fact, there are an infinite number of symbols and images, other than human or cartoon, that are or can be made meaningful to adolescents. When these symbols and images are used in a knowledgeable fashion in the creation of cigarette advertising, they can make a powerful, persuasive connection with adolescents, encouraging them to smoke. We must all remember that we live in a world of "floating signs" in which any symbol can stand for anything.

As I mentioned previously, an example of how the tobacco industry will still be able to market to children can be seen in the latest Camel Light campaign. This campaign was launched in early July to coincide with the demise of Joe Camel. It seems that killing off Joe Camel and the Marlboro Man may satisfy many of the industry's critics, but the death of these symbols will not seriously diminish the power of tobacco advertising to reach and influence children. As you can see by look-

* Note: The information referred to has been retained in the committee files.

ing at this advertisement—an advertisement that would be perfectly acceptable in “adult” magazines under the proposed deal—the industry has already reinvented itself with a powerful new campaign. Our analysis demonstrates that there is a step-by-step, “no-fail formula” used by the tobacco industry to create effective advertising such as this that targets young people *without* the use of traditional tobacco advertising images.

This formula begins with understanding the emotional needs, cultural values and particular developmental issues of adolescents today. It then isolates a set of symbols meaningful to adolescents, other than human image or cartoon characters, such as the motorcycle—a symbol of freedom, independence and rebellion. The final step in the formula is to connect the particular brand of cigarettes to the needs, values, and issues of adolescence through the identification of the brand with the meaningful symbol.

As this new advertisement for Camel Lights demonstrates, the formula continues to be fully utilized by the tobacco industry. This print ad uses several symbols—the motorcycle, the wings of an eagle—wings that are very similar to the logo used by the Harley-Davidson motorcycle company, the camel and the color black to create a powerful visual message that will appeal to adolescents. These visual symbols are reinforced in the ad by the bold, permissive headline: “Live Out Loud.”

A more detailed breakdown of the ad by our advertising experts reveals the following:

The Motorcycle: A symbol of personal freedom, rebellion, masculinity and virility; often equated with tough guys and “bikers”, adventure and risk-taking. Specific focus on the fender and tire portion of the cycle suggests speed, excitement, racing and competition. Even though, theoretically, tobacco ads will no longer be able to show or sponsor sporting events, this ad demonstrates how easy it will be to continue symbolic association with a cigarette brand and sporting events.

The Wings of an Eagle: A powerful symbol of America, strength, pride and freedom. As used in this ad, it is closely connected to the eagle emblem of the Harley-Davidson brand. Therefore, identity transfer occurs not only from the images of the eagle symbol, but from the Harley-Davidson brand as well.

The Use of the Black/Dark Background: Symbol of night, mystery, intrigue, sexuality, adventure and excitement. The color black also represents the “darker” side of the self as aggressive and rebellious—all issues that teens struggle in their search for identity.

The Camel: The traditional symbol of the Camel brand; a different unusual animal; independent, strong, not needing much to survive; indefatigable.

The Line—“Live Out Loud”: A motto or potential war cry for adolescence; encouraging young readers to be bold, stand up for yourself, take a position, be assertive, make a statement, take risks.

Mr. Chairman, the American Lung Association endorses the Koop/Kessler advertising and marketing recommendations. To achieve the Koop/Kessler goal of no advertising directed at people under age 18, we recommend the following:

- All tobacco advertising visuals accepted in publications for over-18 audiences should be limited to black-and-white ads showing only the product package. No props or scenery of any kind should be allowed. Except for the warning label, no copy should be allowed.

- The Koop/Kessler Advisory Committee recommends a ban on advertising, marketing and promotion of tobacco products directed at persons under age 18. Therefore, all publications that accept tobacco advertising should be required to conduct annual readership studies showing the percentage of readers under age 18. Those with an under-18 readership of more than 15% or one million readers should be prohibited from running tobacco advertisements or announcements of tobacco marketing or promotional campaigns.

- The Koop/Kessler Advisory Committee makes excellent recommendations for banning direct and indirect payments for tobacco product placement in movies, TV programs and video games. The American Lung Association additionally recommends an end to payments to entertainment and sports figures to smoke “in public” or in the course of their professions (i.e., live music performances).

The American Lung Association believes that our recommendations would pass the First Amendment tests.

Mr. Chairman, the American Lung Association would like to take the opportunity to address other parts of the proposed settlement that we find troubling. For instance, much has been made of the so-called “look back” provisions of this agreement. These provisions commit the tobacco companies to achieve a 60 percent reduction in adolescent tobacco use within ten years or face “severe” economic penalties. In July, Congress voted to increase the tobacco tax by 15 cents. The tax increase

is nearly twice what the tobacco companies would have to pay, under the deal, for a pack of cigarettes if they fail to achieve a 60 percent reduction in adolescent smoking. The tobacco companies can even get 75% of their 8-cent penalty back if they can demonstrate they made a good faith effort to comply.

On this issue, we again concur with the findings of the Koop/Kessler committee. Experience tells us that small incremental increases in the package price of cigarettes have very little long-term or even near-term impact on the habits of smokers. Absent a truly punitive increase in price associated with failure to achieve the "look back" objectives, there will be no real penalty paid by the industry and thus no incentive to actually achieve a 60 percent reduction in youth smoking.

The American Lung Association believes that nothing less than a penalty of \$1 a pack or more is needed. We recognize that, over time, even \$1 a pack will become insufficient, but to suggest at the outset that a penalty of just 8-cents per pack ten years from now will discourage smoking or inhibit the tobacco company's efforts to reach and addict children is nonsense.

The penalties also must be company-specific. If the entire industry is penalized as a group, it just becomes another cost of doing business, passed on to the consumer without any competitive disadvantage. We support non-monetary penalties such as further limitations on advertising. We need to fundamentally change the motivation for selling cigarettes to our children. Unfortunately, the deal's weak attempt to do this only perpetuates the economics of selling cigarettes to our kids.

Another important health-related provision of this deal relates to document disclosure. The American Lung Association shares Drs. Koop and Kessler's belief that the document disclosure provisions of the proposed settlement represent nothing less than an attempt by the industry to avoid making public myriad materials that relate to public health, medical research, marketing and advertising, consumer fraud, potential criminal activities, and anti-trust violations on the part of the tobacco industry.

Right now, the documents that we believe should be disclosed are locked away from public scrutiny. We are told that if the industry is forced to disclose those documents, they will abandon the settlement. If there was ever any doubt that these documents must be fully disclosed, the tobacco companies' threat to abandon the settlement resolves that issue. They must be hiding some awful secrets if they are willing to abandon a deal that serves them so well.

We know the tobacco companies realized that nicotine was addictive. We just don't know how long they have known it. We don't know how they manipulated nicotine to increase the likelihood of addiction. We don't know what they know about how to reduce the impact of that addiction.

We know that the tobacco companies have targeted children. If we understood more about how this targeting works, we could intervene and keep children from smoking.

Moreover, Mr. Chairman, we have no idea what their studies of the impact of tobacco on health show. We know, for example, that tobacco and asbestos are an incredibly dangerous combination. We don't know what the tobacco industry knows about that subject or how long they have known it or what its implications are for asbestos disease.

We don't know what the tobacco industry's research reveals about the relationship of tobacco to other occupational and environmental contaminants. And, most of all, we don't know what the tobacco industry knows about how people addicted to smoking might be cured or how nicotine and other health-related aspects of tobacco might be reduced.

These are critically important public health questions. It would be criminal to deny scientists and public health experts complete access to any industry documents that might answer these questions.

With respect to environmental tobacco smoke, or ETS, the agreement is much less protective of the public health than many current state laws and local ordinances. The proposed deal will leave millions of Americans exposed to ETS at work. The American Lung Association chaired the ETS subcommittee of the Koop/Kessler committee and we support its conclusion that exposure to ETS should be eliminated. We do not support codifying ETS exposure, as this settlement would. The American public demands and deserves smoke-free environments.

Despite the use of the word "global" to describe this deal, its only global aspect is tranquility for the tobacco industry in the U.S. so it can concentrate on markets abroad. Recently, in China, tobacco and health experts from all over the world gathered for the 10th World Conference on Tobacco or Health. The consensus of the world's experts was that this is a bad deal and we must do more to stop the horrible toll that tobacco takes on people around the world.

The American Lung Association also is concerned about three issues that fall under the general sub-head of immunity or civil justice. These issues can be more completely addressed by parties expert in the law.

Our views will be from a policy perspective. Under the agreement, the tobacco companies will be immune from punitive damages. State laws will be preempted. The tobacco companies also will be immune from disclosure of potentially revealing documentary evidence of their past actions. Finally, the tobacco companies will be immune from consolidated litigation. If these three provisions become reality, successful litigation against the tobacco companies will be highly unlikely. Not because the evidence will be suppressed but because the economics of successful litigation will be eliminated.

There are thousands of victims of tobacco-related disease. Those victims, who may have been warned of the disease-causing aspects of tobacco smoke, had no reason to believe that the product was addictive; that the tobacco companies deliberately addicted victims to tobacco smoke; or that the tobacco companies may have manipulated nicotine in order to increase addiction.

Under ordinary circumstances, victims who have been deliberately or willfully misled are eligible for punitive damages. The very threat of punitive damages imposes a standard of caution on businesses and individuals. Without that standard, businesses and individuals may have little economic reason to act in the public interest. The tobacco industry's willful disregard for human life by using or hiding their knowledge of the addictive nature of nicotine will not be punished if the tobacco deal is approved. The precedent is awesome. To think that this industry, which may have committed the most egregious and deliberate acts against the health of their consumers, may be insulated from punishment raises the question: What kind of conduct should be held to a higher standard of economic damages? With less information and more government knowledge major asbestos companies were forced to bankruptcy. By comparison, the big tobacco companies get off the hook.

Punitive damages are the equivalent of capital punishment for corporations. They are not tax deductible. Shareholders bear the cost of corporate disregard for appropriate behavior. This proposed deal would immunize the tobacco companies from this form of capital punishment. It also would make sure the public never knows the full nature of the tobacco companies' efforts to addict the public. It will be virtually impossible for individuals, insurance companies, labor union health plans or others to recover the full range of costs incurred as a result of tobacco-related disease.

Corporations, like individuals, must be held responsible for their acts. Punishment should be based on the egregiousness of those acts. This deal says that a small number of powerful corporations, which have committed egregious acts against public health, should not be punished. That is just simply wrong. At the very least, these issues should be resolved in the courts, judged by the same standards that apply to any other corporation or individual involved in a civil action.

Mr. Chairman, there are other important issues that relate to this deal. The American Lung Association is concerned about the future of tobacco farmers and farm communities. We support the Koop/Kessler committee recommendations to assist with the development of alternatives to tobacco farming.

We are concerned that the settlement's federal tobacco sales licensing requirement may preempt further state and local requirements. The deal describes the licensing program as "minimum federal standards." But the proposed regime of penalties and enforcement could limit local enforcement.

We commend the Senate for voting to repeal the \$50 billion special tax credit for the tobacco industry, but the entire \$368 billion cost of the deal can be written off as business expense. It is outrageous that the taxpayers will be forced to underwrite the cost of this deal.

Mr. Chairman, some would have your committee and Congress as a whole believe that this deal is the only or best chance we have to curb the scourge of tobacco. When someone tells me I have to buy today because a deal this good won't last, I get very suspicious. The proposed deal is inadequate in so many ways that there is little to redeem it. Before Congress rushes to enact a deal negotiated in back rooms, it should fully examine the consequences. Only the tobacco industry fears going to court. We are not worried about the states proceeding with their individual cases, in fact, we welcome it. Florida achieved more than Mississippi and we expect Texas to achieve even more. When Minnesota goes to trial in January and all their documents are finally released, the American people will more fully understand the nature of the tobacco industry's wrongdoing.

This tobacco deal is fraught with deficiencies and loopholes that favor the tobacco industry. If the deal is crafted into legislation, there will be even more gifts for big

tobacco. Mr. Chairman, the American Lung Association urges you to be cautious and patient as you explore the best ways to protect the people, especially the children, of this nation, and the world from the health hazards of tobacco use. Thank you for the opportunity to testify on this important aspect of the proposed tobacco deal.

The CHAIRMAN. Thank you very much, Dr. Munzer. Dr. Munzer, do you support the entire Koop-Kessler recommendations?

Dr. MUNZER. We support the Koop-Kessler recommendations and we do offer the added provision on advertising. As time goes on, it is very obvious that the tobacco industry is already beginning to circumvent some of the provisions, and we are seeing more and more problems. That is why we feel that it is extremely important that nothing be done that preempts the authority of the Food and Drug Administration to act now, within 5 years, and beyond 5 years.

The CHAIRMAN. Do you think that the FTC should play a significant role since they basically should control advertising?

Dr. MUNZER. We have supported action by the FTC in the past.

The CHAIRMAN. Thank you.

Senator Wyden.

Senator WYDEN. Only one, Mr. Chairman.

On this question of advertising relative to the nature of price increases with respect to children, I think you have heard me say that I am increasingly skeptical of some of the steps with respect to advertising restrictions, just because all of you in the public health community have done your job too well. You have laid out systematically how the industry just builds a road map around these advertising curtailments.

What is your view with respect to the price increases versus advertising changes debate in terms of helping to deter kids?

Dr. MUNZER. Both of course are important, but there is no question that the only proven way to reduce consumption of cigarettes by kids is a stiff increase in the price of tobacco.

Senator WYDEN. Thank you, Mr. Chairman.

The CHAIRMAN. Dr. Munzer, have you got a handle on how much of a tax increase on a pack of cigarettes would be in order to truly be a disincentive to teenage smoking?

Dr. MUNZER. The American Lung Association supports an increase in the excise tax on tobacco to \$2 per pack. We feel that would be effective.

The CHAIRMAN. And that is based on some studies and your experience with the issue over these years?

Dr. MUNZER. There are some very good studies. There is good experience in other countries, notably our neighbor in Canada, to support, and very good economic studies to show that an increase in the price of cigarettes by a substantial amount serves as a very strong disincentive to smoking by children.

The CHAIRMAN. Roughly a \$2 increase from its present price, is that correct?

Dr. MUNZER. That is correct.

The CHAIRMAN. Thank you, Dr. Munzer. You have been very helpful and we appreciate it. We certainly understand why you have to go about your very important duties and we thank you.

Dr. MUNZER. I very much appreciate your courtesy. Thank you.

The CHAIRMAN. Thank you.

Mr. Wise, welcome.

**STATEMENT OF D. SCOTT WISE, ESQ., PARTNER, DAVIS, POLK
AND WARDWELL**

Mr. WISE. Thank you, Mr. Chairman. I am pleased to be here today to add maybe somewhat of a different perspective to all of this. I come to these issues really only through an interesting and somewhat challenging professional engagement as a lawyer, and I am one of the lawyers working for the tobacco industry that sat through the negotiations. I am glad to have a chance to be here to help explain what it is we did and what it is we ended up with at the end of that process.

It was an interesting assignment. Our client RJR-Nabisco came to us a year ago and asked us—literally just a year ago—and asked us to help them think about whether there was not some new way to deal with the various issues and problems that were facing the industry and to try to strike out in a new direction that would kind of leave the era of confrontation and litigation behind, and literally just a year ago, sitting around in conference rooms in New York City, trying to imagine a process, even imagine a process that could get us to where we are today, was hard to do.

I would be the first to admit, Mr. Chairman, that this is and has been an unusual professional experience and it is an unusual set of circumstances that bring us to present this proposal to you and the rest of the Congress.

The CHAIRMAN. You found out who your friends are?

Mr. WISE. I continue to, right.

We wanted to—and make no bones about it, a very ambitious concept—try to deal with the potential for an agreement that could settle all of, virtually all of the material litigation against the industry that is pending in the courts of the Nation today, that would settle once and for all with legislative clarity directed to the problem specifically the ability of the FDA to regulate tobacco products, that would in effect settle the litigation that is now pending in the fourth circuit over that, and that would at the same time address the concerns that you have heard expressed so eloquently this morning about youth smoking.

I am not an expert on youth smoking. I did sit through the negotiations and I can tell you how that negotiation went. But what we came up with to address it was in response to the position you have heard advanced this morning from the public health experts, that what was required was a multifaceted approach that really came at the problem from all these different directions.

As part of an overall comprehensive resolution of these issues, the industry got itself into a position where it was willing to agree to the really quite remarkable concessions that it has made in the areas of first amendment rights, advertising and marketing, et cetera, of their products.

The theory that we—so the premise from which we started was that the most would be achieved in an agreement that could be supported by all of these disparate factions. It was a multilateral negotiation among antagonists that had been antagonists for years, decades in fact. The concept we were advancing was that if we could identify as negotiators as much common ground among these

parties as possible, there would be in the end a chance that each of the parties to the negotiation would find the consensual resolution that we could offer them more advantageous to them than the absence of a resolution. That is, that all the parties to this discussion would see in this resolution a better future from their own perspectives individually than they would see in any other scenario in the absence of this resolution.

That is the concept of our agreement, and I would suggest to the committee and the Congress that it could appropriately review our agreement against that kind of backdrop. That is, in light of all the other various scenarios one can play out in the absence of this, if the litigation goes forward, who wins, et cetera.

We think when one does that and evaluates fairly this as an option that it is not a close question and that there is so much to benefit the public in this agreement at the end of the day, as well as the individual parties to the negotiation, that the Congress should see its way clear to implement all the terms of this agreement as in the national interest.

I would agree with Mr. Myers that, for what it is worth, that I think, given the history of the industry and how we have gotten this far in the last year of this process, it does seem to me to represent an opportunity that should not be missed to try to harness these dynamics that have led us to this posture in a way that really does advance the public interest and the public health and the United States.

As to the specific proposals that are contained in our agreement with respect to youth and youth usage of the product, which is obviously one of the primary concerns of everybody, I will just briefly touch on what they are. I think Mr. Myers did cover them this morning. But in response to this demand from the public health experts that there needed to be this multifaceted approach, what we ended up with was exactly that, a completely new set of regulations directed toward youth access to the products, a funded mandate to the States that would require serious retail licensing laws in each of the States, with funding to enforce them.

This is obviously a new development. There has never been this availability of funding before for the States and local authorities to really put some teeth into retail regulation of the minimum age requirements, and people in the industry at least think that is a significant, a truly significant step forward in just enforcement of the laws.

Second, these, although criticized, to others astonishing first amendment restrictions—astonishing in light of the first amendment restrictions on advertising, that go way beyond where the FDA was when they proposed their rule a couple years ago and really do, the companies believe, restrict significantly their ability to communicate with their adult consumers, but nonetheless they were willing to go along with as part of this overall resolution of so many of the issues that face these businesses.

Third, is the funding for this public education campaign which Mr. Myers and you all discussed this morning.

Fourth, is one of the provisions that has received a little bit more attention than others, is the so-called lookback area, in which for the first time the industry was willing to accept as part of this

overall resolution a concept that would involve greater payments made by the industry if specific targets of reduction of youth incidence were not met.

That is something that was contemplated in the original FDA proposal and was finally dropped out of the final FDA rule. The FDA did not even attempt to address or to put forward a true lookback that created financial incentives on the part of the companies to meet these reduction targets.

That is what we came up with as the four principal parts of the agreement relating to youth. I would say I could not agree with the chairman more about the difficulties of getting one's arms around all this and all the moving parts of it, and I think I could not agree with you more that there is a public interest urgency to addressing it expeditiously. But obviously no one has asked and we do not mean to be perceived as asking the Congress to do anything that is rushed or not in an otherwise thorough manner, evaluating all the aspects of this and understanding how it all works together to, No. 1, achieve the support of all the people who were in this process, and, No. 2, achieve what the experts believe are significant public health advances if this comprehensive resolution could get implemented by this Congress.

I think we all agree that if it were it would be a major and truly historic piece of legislation.

So with that, I am happy to answer your questions on how we got to where we are.

[The prepared statement of Mr. Wise follows:]

PREPARED STATEMENT OF D. SCOTT WISE, ESQ., PARTNER, DAVIS,
POLK AND WARDWELL

My name is Scott Wise. I am a partner in the law firm of Davis Polk & Wardwell, which has served as counsel to R.J.R. Nabisco and R.J. Reynolds. I was one of the negotiators of the Proposed Resolution that was signed on June 20, 1997, by various State Attorneys General, counsel for plaintiffs in tobacco class actions, representatives of the public health community, and the major tobacco manufacturers. I appreciate the opportunity to provide testimony regarding the elements of the agreement that respond to concerns about underage tobacco use, with particular emphasis on how the sales and advertising restrictions outlined in the agreement would be implemented and enforced.

In August 1995, the U.S. Food and Drug Administration ("FDA") proposed a series of tobacco sales and advertising restrictions, as well as new labeling information and educational programs. The agency said it was "confident" that the proposed rules "would significantly diminish the allure as well as the access to tobacco products by youth," and it projected regulatory benefits on the presumption that the rules would be sufficient to meet the agency's goal of reducing underage tobacco use by 50 percent in seven years.¹ In publishing its final tobacco rules in August 1996, the agency said that the comments it had received on its proposed rules had "reinforced [its] conviction" that this goal, could be realized, though it added that success would depend on the active support of State and local governments, civic and community organizations, manufacturers and retailers.²

¹ *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents—Proposed Rule*, 60 Fed. Reg. 41314, 41362 (August 11, 1995) ("Proposed Rule"). See also *id.* at 41340-41 (describing seven-year goal).

² *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents—Final Rule*, 61 Fed. Reg. 44396, 44568 (August 28, 1996) ("Final Rule"). See also *id.* at 44573 (agency "confident that its goals [were] reasonable" in view of the rules it had adopted); HHS Fact Sheet, *Key Elements of President's Plan to Reduce Children's Use of Tobacco*, at 1 (August 23, 1996) ("This comprehensive and coordinated plan is intended to reduce tobacco use by children and adolescents by 50 percent in seven years.")

The negotiators of the Proposed Resolution used the FDA rules as a baseline in fashioning an even more aggressive program to reduce underage use of tobacco products. In important ways, the agreement goes further than the FDA.

The principal components of the Proposed Resolution that respond to concerns about underage tobacco use include, among other things, (1) severe restrictions on advertising and marketing, (2) access restrictions with assured enforcement, (3) a national industry-funded educational campaign, and (4) measures to hold the manufacturers and the States financially accountable if targets for reducing underage tobacco use and underage tobacco sales are not achieved on schedule. This package of measures goes far beyond the measures that the FDA initially proposed and finally adopted; it includes elements—principally in regard to tobacco advertising—that many believe could not be achieved by legislation or regulation for constitutional reasons; and, in general, it would establish a comprehensive program to combat underage tobacco use that could not be achieved in any other way.

I will devote my testimony today to explaining this package of measures directed against underage tobacco use, with special attention to the manner in which the negotiators contemplated that those measures would be implemented and enforced. Attached as Exhibit A is a summary of all of the agreement's provisions, including the provisions that I will discuss today. Attached as Exhibit B is a chart that sets out a comparison between the FDA rules promulgated last year and the agreement, and which is helpful in showing how the agreement goes way beyond the FDA rule in these areas.

1. RESTRICTIONS ON MARKETING AND ADVERTISING

Background

Federal law prohibits cigarette and smokeless tobacco advertising on television and radio. The public health community has long called for further restrictions on tobacco product marketing and advertising as a means of reducing underage tobacco use. The tobacco industry has vigorously resisted these additional proposed restrictions as unwarranted and unconstitutional. Along with national advertising trade associations, the industry has challenged the FDA's advertising restrictions in particular as violative of the First Amendment.

In April 1997, U.S. District Judge Osteen struck down that part of the FDA's tobacco rules regulating tobacco advertising as not permitted by the statutory provision relied on by the agency.³ That ruling, which made it unnecessary for the court to reach the industry's First Amendment claims, currently is on appeal to the U.S. Court of Appeals for the Fourth Circuit. In addition, several Federal courts (though not all) have ruled that the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.) preempts specific State and local regulation of cigarette advertising.⁴ The Supreme Court's commercial speech decisions indicate that further attempts by Federal, State or local governments to restrict tobacco advertising face significant obstacles under the First Amendment.⁵

The Proposed Resolution

The Proposed Resolution would avoid these legal obstacles, as discussed below, and impose restrictions on tobacco marketing and advertising that are unprecedented in scope and severity. The Proposed Resolution includes every element of the FDA's rule, for example:

- It bans non-tobacco brand names or logos on tobacco products (except for tobacco products in existence on January 1, 1995).
- It bans tobacco brand names, logos and selling messages on non-tobacco merchandise (e.g., t-shirts, gym bags, caps).
- It bans sponsorship of sporting and cultural events in the name, logo or selling message of a tobacco product brand.
- It restricts tobacco advertising to black text on white background except in adult publications and adult-only facilities.
- It requires tobacco advertising to carry a statement of intended use ("Nicotine Delivery Device").
- It bans offers of non-tobacco items or gifts (e.g., t-shirts, gym bags, caps) based on proof of purchase of tobacco products.

³ *Coyne Beahm, Inc. v. United States Food & Drug Administration*, 958 F. Supp. 1060 (M.D. N.C. 1997).

⁴ *Eg., Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994); *Chiglo v. City of Preston*, 909 F. Supp. 675 (D. Minn. 1995); *Sparks v. R.J. Reynolds Tobacco Co.*, Case No. C94-783C (W. D. Wash. Dec. 9, 1994).

⁵ *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996); *Rubin v. Coors, Inc.*, 115 S. Ct. 1585 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993).

The Proposed Resolution also exceeds the FDA rule, for example:

- It bans human images and cartoon figures like Joe Camel and the Marlboro Man in all tobacco advertising and on tobacco product packages.
- It bans all outdoor tobacco product advertising, including advertising in enclosed stadia and indoor advertising directed outdoors.
- It not only limits point-of-sale advertising to black-on-white, text-only signs, but also regulates number and size of signs (except in adult-only facilities).
- It bans tobacco product advertising on the Internet unless designed to be inaccessible in or from the United States.

The Proposed Resolution would eliminate the legal uncertainty inherent in the present situation with respect to the FDA's statutory authority, State and local authority, and First Amendment limits. To avoid these statutory and constitutional problems, many of the advertising and marketing restrictions included in the Proposed Resolution would be instituted through contracts between the manufacturers and the Federal government and the States. Because these contracts would be consensual—entered into by the manufacturers as part of a settlement of litigation—they should not be found to involve coercive governmental action of the type that should implicate the First Amendment. For the same reason, there would be no basis for a challenge from third-parties claiming First Amendment injury.

Implementation and enforcement

Two types of contracts are envisioned: (1) a national Protocol—a binding contract between the manufacturers and the Secretary of Health and Human Services—which would be enforceable by the Federal government and the States, and (2) consent decrees with the individual States containing all of the advertising restrictions contained in the Protocol, which also would be enforceable by the States.

The Protocol would provide that its terms are to be enforced as provided in implementing Federal legislation. That legislation, in turn, would provide for enforcement in three ways:

First, by the Federal government through actions in which the courts would be authorized to issue injunctions restraining violations, to order specific performance of the obligations in the Protocol, and to order civil penalties for violations based on the civil penalties contained in the Federal Food, Drug, and Cosmetic Act.

Second, by individual States through actions, either under the Federal legislation or State consumer protection laws, with the same relief available (injunctions/specific performance/penalties) as would be authorized in the case of enforcement actions brought by the Federal government.

Third, by the manufacturers themselves, if the Federal government and the States did not take enforcement action as to alleged violations, through lawsuits to enjoin violations and to recover damages arising from the other manufacturer's violations.

In addition, the State consent decrees would provide an additional enforcement mechanism: The States could go into court for an immediate injunction to restrain violations of the decrees.

The five manufacturers that were represented in the negotiations obviously are prepared to enter into these contracts if the Proposed Resolution as negotiated is approved. But other manufacturers also are given incentives to enter into these contracts. In addition, the contracts would create strong incentives for distributors and retailers to operate in compliance with these and other applicable restrictions on tobacco distribution, sale and marketing. Under the implementing legislation, moreover, retailers and distributors would receive protection from civil liability in tobacco-and-health cases only if they comply with those restrictions.

2. ACCESS RESTRICTIONS

The Proposed Resolution

The Proposed Resolution imposes tobacco sales and access restrictions that are more comprehensive and more stringent than the FDA's rules.

The Proposed Resolution includes every element of the FDA's rules addressing youth access:

- *Minimum sales age.* Retailers are prohibited from selling cigarettes or smokeless tobacco to anyone under 18.
- *ID requirement.* Retailers must demand a photo ID from anyone under 27 demonstrating that the person is 18 or older.
- *Unopened packs; minimum package size.* Bans the sale of tobacco products from unopened packs; sets 20-cigarette minimum pack size.
- *No free samples.* Sampling is prohibited both in person and through the mails.

- *Mail-order sales restricted.* No mail sales without age verification, subject to FDA review in two years.

- *No self-service displays (except in adult-only facilities).* Except in adult-only facilities, tobacco products must not be accessible to consumers without the assistance of the retailer (i.e., must be kept behind the counter or under lock and key; in addition, tobacco products, if kept on counter, may not be visible to consumers).

The Proposed Resolution also goes beyond the FDA rule, for example:

- *No Vending Machines.* FDA's rules allow vending machines in "adult-only" venues; under the Proposed Resolution, they would be banned everywhere.

Going far beyond FDA's rules, the Proposed Resolution also would set minimum Federal standards for a retail licensing program that State and local authorities would administer and enforce with funding provided by the industry.

- *License required to sell tobacco products.* Any entity that sold directly to consumers—whether a manufacturer, wholesaler, importer, distributor or retailers—would need to obtain and maintain a license.

- *Penalties including suspension or revocation of license.* Sellers would be subjected to stiff penalties (up to \$25,000 for a sixth or subsequent offense at a particular retail outlet), and potentially to suspension or loss of their licenses, if they did not comply with the access restrictions.

Each State would be required to enact a regulatory enforcement scheme that would provide substantially similar penalties to the minimum Federal standards for a retail licensing program. The Proposed Resolution would not limit State and local government authority to adopt additional measures aimed at restricting or eliminating youth access to tobacco.

3. NATIONAL EDUCATION CAMPAIGN

The FDA had initially proposed, but did not adopt, a rule requiring the manufacturers to fund a \$150 million-a-year national public education campaign to discourage persons under 18 years of age from smoking or using smokeless tobacco products. Under the Proposed Resolution, according to its preamble, the industry would fund as determined by Congress, a "national education-oriented counter-advertising and tobacco control campaign seeking to discourage the initiation of tobacco use by children and adolescents and to encourage current tobacco users to quit use of those products."

4. "LOOK BACK" PROVISIONS AND STATE ENFORCEMENT INCENTIVES

The Proposed Resolution establishes steep required reductions both in the level of underage tobacco use, and in the extent of illegal tobacco sales to minors. It would hold the manufacturers financially accountable if the specified targets for reducing underage tobacco use are not met, without any showing of fault or responsibility on the industry's part. It likewise would hold the States financially accountable if the specified targets for reducing illegal tobacco sales to minors are not met.

"Look Back" Provisions

FDA had initially proposed, but did not adopt, a rule requiring further measures if underage tobacco use did not fall by 50 percent in seven years. The Proposed Resolution sets ambitious goals for reducing underage tobacco use. It requires manufacturers to pay surcharges if the target rates are not met and maintained, and provides States with new enforcement incentives. The FDA will determine whether the target rates have been met by assessing annually the prevalence of underage tobacco use.

- Five years after enactment, youth smoking must decline by at least 30 percent from estimated levels over the last decade. Underage smokeless tobacco use must decline by at least 25 percent from current levels.

- Seven years after enactment, youth smoking must decline by at least 50 percent from estimated levels over the last decade and smokeless tobacco use by at least 35 percent from current levels.

- Ten years after enactment, youth smoking must decline by at least 60 percent from estimated levels over the last decade and smokeless tobacco use by at least 45 percent from current levels.

If these targets are not met, the manufacturers must pay a surcharge of \$80 million per percentage point, up to \$2 billion per year. The \$80 million amount represents an approximation of the present value of the "profits" the industry would realize from sales to the "excess" underage tobacco users over the course of their entire lives.

The FDA could, in its discretion, give a manufacturer a surcharge rebate of up to 75 percent, but only if the manufacturer can prove that it has fully complied with

all applicable provisions of the agreement, has used all "reasonably available measures" to reduce youth consumption, and has not taken any action to undermine attainment of the target reduction rates. State attorneys general are entitled to participate in rebate hearings and to appeal any rebate decision to a Federal appeals court.

State Enforcement Incentives

Federal legislation implementing the Proposed Resolution would require the States to undertake significant enforcement steps designed to reduce underage tobacco use and access to tobacco products. These enforcement obligations would be funded by the industry.

- Each State would have to meet specified levels of compliance with its minimum sales-age law, or else risk the loss of a significant amount of health care program costs it would otherwise receive under the implementing legislation.

- Amounts withheld from States not meeting the specified levels of compliance within their own borders would be reallocated to States with superior "no sales to minors" records.

The FDA found that enforcement of the access restrictions such as those that are included in the Proposed Resolution can be "extremely effective"—not only in reducing illegal sales, but also in reducing underage tobacco use. The agency has cited the example of an Illinois community in which enforcement of access restrictions cut illegal sales from 70 percent to less than five percent in two years, with a 50 percent drop in rates of experimentation and regular smoking among seventh and eighth graders during the same two-year period.⁶

CONCLUSION

The Proposed Resolution also addresses many other issues relating to tobacco product regulation under FDA authority and civil liability, and would provide billions of dollars for public health care, cessation and education programs and enforcement of all the new rules and regulations. It offers an opportunity for the most far-reaching tobacco control legislation in history. We welcome the Committee's consideration of it.

The CHAIRMAN. Thank you, Mr. Wise, and I appreciate, especially as one who was involved in the negotiations, I appreciate your understanding of the difficulties that we face.

Thank you.

Dr. DiFranza.

STATEMENT OF JOSEPH R. DiFRANZA, UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER, ON BEHALF OF STOP TEEN-AGE ADDICTION TO TOBACCO

Dr. DiFRANZA. Senator McCain, thank you for the opportunity to speak to your committee today on behalf of the nonprofit organization STAT, which stands for Stop Teenage Addiction to Tobacco.

Eleven years ago I was the first person to send a child into a store to see if the store would sell them tobacco. I sent my daughter into 100 stores and out of the 100 stores 75 of the merchants illegally sold her tobacco, although she was only 11 years old. Children living in 99 percent of the cities and towns in the United States can still walk into stores and buy tobacco without a problem.

Before you—you see the cigarettes that my children, children working for me, bought this summer even after the passage of the FDA regulations.

Each year, under-aged smokers consume well over \$1.25 billion worth of cigarettes. On the bright side, in the few communities where children cannot buy tobacco we have seen dramatic reductions in teen smoking. In Leominster, MA, we saw a 40 percent re-

⁶ Proposed Rule, 60 Fed. Reg. at 41362; Final Rule, 61 Fed. Reg. at 44573.

duction in teen smoking, and in Woodbridge, IL, a 69 percent reduction in teen smoking—69 percent. So if you want to know why children use tobacco, you can put up to 69 percent of the blame on the merchants who are happy to sell it to them.

Since 1990 the tobacco industry has been promoting its own educational campaign for merchants, called "It's the Law," designed to encourage merchants to obey the law. Unfortunately, in a study that I include in the packet for you, we tested the "It's the Law" program and found that it was worthless, that the merchants who had these stickers up in their windows were just as likely to break the law as the merchants who were not participating in the program.

A well-funded Federal enforcement program as envisioned in the settlement could have a huge impact on teen tobacco use. By far it is the most important measure in the settlement and the tobacco industry's worst nightmare. Imagine a 69 percent drop in future tobacco sales.

While it says it supports the law, the tobacco industry has waged a relentless State-by-State effort to sabotage the enforcement of these laws. For example, tobacco supporters in North Carolina and Georgia had written laws to make it illegal to knowingly or intentionally sell tobacco to minors. When authorities in these two States tried to enforce the law, the court threw out the cases, commenting that it was impossible to prove what the merchants were thinking while they were selling the children tobacco.

Inserting the words "knowingly" or "intentionally" makes the law unenforceable. When efforts to prosecute these merchants proved futile, the tobacco industry set off on a national State-by-State campaign to have similar language inserted into the laws of other States, and so far has succeeded in at least a dozen States.

In States where concerned communities were doing a great job of enforcing the law, the tobacco industry pushed through preemptive State legislation which stripped local officials of the ability to enforce the law. In other States the industry has sabotaged enforcement by sponsoring bills that stripped all health officials and police officers throughout the State of their authority to enforce the law, leaving in some cases only a single individual in the entire State with the authority to enforce the law.

In Utah the industry sponsored a bill which would cripple enforcement by placing 20 restrictions on how police could do these under-aged buyer tests.

The details of this campaign of sabotage are also included in one of the published articles in your packet.

The settlement legislation will give the tobacco industry the opportunity to simultaneously sabotage youth access laws in every State since Federal law is preemptive over State law. An industry which can quietly slip itself a \$50 billion tax deduction might find it relatively easy at the last minute to slip the words "knowingly and intentionally" into a bill that may run into the hundreds of pages. This could cripple the enforcement of youth access laws in every State.

In Vermont the legislature guaranteed that their youth access law would be enforced effectively by mandating that the respon-

sible agency enforce the law with sufficient vigor to ensure that at least 90 percent of merchants are obeying the law.

Although the settlement might set up and provide funding for Federal enforcement of these laws, it does not guarantee that this or future administrations will actually enforce the law effectively. In summary, the settlement guarantees that the tobacco industry will remain healthy and profitable for the next 25 years, but does not guarantee that we will ever see the promise of a vigorous Federal enforcement program become a reality.

Additionally, this legislation affords the tobacco industry with a golden opportunity to ensure that merchants will continue to illegally supply children with tobacco with impunity.

Thank you.

[The prepared statement of Dr. DiFranza follows:]

PREPARED STATEMENT OF JOSEPH R. DIFRANZA, UNIVERSITY OF MASSACHUSETTS
MEDICAL CENTER, ON BEHALF OF STOP TEENAGE ADDICTION TO TOBACCO

Senator McCain, members of the committee, thank you for the opportunity to speak to you today on behalf of the non-profit organization STAT, which stands for Stop Teenage Addiction to Tobacco. STAT is the only national organization which is primarily concerned with preventing tobacco use among children. STAT has pioneered the research concerning the illegal sale of tobacco to minors.

Eleven years ago, my daughter performed the world's first underage buyer tests to determine if merchants were illegally selling tobacco to children. Out of 100 merchants, 75 illegally sold tobacco to my 11 year old child with no questions asked. I have been conducting underage buyer tests every year since then, and although there has been a small improvement, I am sad to say that children living in 99% of our cities and towns have little trouble walking into a store and buying a pack of cigarettes.

On the bright side, in communities where children cannot buy tobacco, we have seen dramatic reductions in teen smoking. In Leominster, Massachusetts we saw a 40% reduction, and in Woodridge, Illinois, a 69% reduction in teen smoking has been sustained for over 5 years. The smoking rate among Woodridge teenagers after graduation from high school is only one fifth the national average. The tobacco industry's worst nightmare would be to see the Woodridge approach to enforcement enacted on a national level, and yet the settlement *appears* to be intended to do just that.

The Woodridge model includes: (1) licensing of all tobacco vendors, (2) quarterly attempts by an underage buyer to purchase tobacco from each vendor, (3) automatic fines for illegal sales, and (4) license suspension for habitual offenders.

The proposed settlement suggests an attempt to duplicate the Woodridge model nationally. Whether or not it succeeds will depend completely on the fine details. For the past decade, the tobacco industry has done everything in its power to sabotage efforts to duplicate the Woodridge model in other states. It is likely that they will also try to sabotage the settlement legislation to guarantee that effective enforcement will not be possible.

THE TOBACCO INDUSTRY'S ONGOING EFFORTS TO SABOTAGE THE ENFORCEMENT OF
YOUTH ACCESS LAWS

Since 1990, the tobacco industry has been discouraging states from enforcing youth access laws by promoting their own voluntary merchant education programs. The tobacco industry has never tested the effectiveness of their merchant education programs, but I have, twice. In two published scientific surveys the tobacco industry's "It's the Law" merchant education campaign was found to have no significant effect on merchant behavior. Merchants who were participating in this voluntary program were just as likely to make illegal sales to children as were merchants who were not participating. By promoting this useless program as a substitute for enforcement the industry has managed to delay the implementation of enforcement.

While the tobacco industry states that it wants strong laws to prevent illegal sales to minors, they have engaged in a relentless, state by state effort to sabotage the enforcement of these laws. In North Carolina and Georgia, it is against the law to "knowingly" sell tobacco to a minor. Efforts to prosecute merchants who broke the law proved fruitless when it could not be proved that the merchants knew that their

customers were underage. For all practical purposes, inserting the words "knowingly" or "intentionally" into a law makes it unenforceable. When efforts to prosecute merchants in North Carolina and Georgia proved futile, the tobacco industry launched a campaign to get the words "knowingly" or "intentionally" inserted into as many state laws as possible. There are now at least 12 states that have adopted this language, where merchants can break the law with impunity.

The tobacco industry has also succeeded in sabotaging enforcement efforts by *limiting the authority to enforce the law* as severely as possible. In some states, all health officials and police officers have been stripped of their authority to enforce the law. In several states, only a single individual remains that is authorized to enforce the law.

In states where effective enforcement was occurring at the community level, the tobacco industry succeeded in passing legislation that stripped those communities of the authority to enforce the law.

In Utah, the industry introduced a bill that included 20 *restrictions on how enforcement personnel could conduct underage buyer checks*.

In order to cover up the extent to which illegal sales are occurring, the industry has successfully passed legislation in many states *making it illegal for researchers, health officials, or the police to conduct underage buyer checks*. This language may also prevent the FDA from coming into the state to conduct checks to enforce their regulations.

A LOOK AT THE DETAILS OF THE SETTLEMENT

Licensing

(1) The settlement calls for a national system of vendor licensing, but it is ambiguous as to whether this licensing system will be administered by the state or federal governments. *A state by state licensing system could be a big mistake*. State tobacco licenses are usually granted by the department of revenue. The department of revenue treats its list of licensees as confidential tax information and will not share that information with any other agency. We already have a "national" system of state by state retailer licensing but the information is not available to those with the authority to enforce the law. This makes it very difficult for law enforcement personnel to locate and keep track of tobacco retailers. If the settlement is enacted into law, the law should create a federal licensing system.

(2) Information in the federal licensing system should be available to anyone with enforcement authority. This is not specified in the settlement.

(3) A federal licensing system should not preempt states or municipalities from requiring their own licenses or permits to sell tobacco. The intent of the settlement is to allow state and local enforcement. State and local enforcement will be much more effective if state and local authorities can issue and revoke their own retailer licenses.

(4) The settlement appropriately provides for the suspension or revocation of retail licenses as a penalty for illegal sales to minors, but it does not spell out who shall have this authority. As a practical matter, the agency or agencies that will be enforcing the law must have the authority to suspend or revoke licenses. Since the FDA will be the primary agency responsible for enforcing youth access laws, the FDA should also be responsible for administering the licensing system. The legislation should be written to allow the FDA to subcontract or delegate this authority to each state to administer.

Underage buyer inspections

(5) It is anticipated that the FDA will enforce the law by contracting with state or local agencies to conduct underage buyer inspections. (Underage buyer inspections are the only way youth access laws have ever been successfully enforced.) Under current law, the FDA is authorized to delegate this responsibility only to state officials who already have enforcement authority. Private agencies and academics such as myself are currently conducting underage buyer inspections at one tenth the cost of identical inspections conducted by state personnel. In other words, private firms can conduct these inspections ten times more efficiently than state governments. The settlement does not specify that the FDA will be able to hire private firms to conduct underage buyer inspections. Such a provision should be added to increase the efficiency and effectiveness of enforcement.

(6) As stated above, some states have adopted laws which prohibit anyone other than a few select people from conducting underage buyer checks. These laws must be preempted by the settlement language to allow the FDA to go into every state to enforce its own regulations.

Penalties

(7) The settlement does not specify if the FDA will have the ability to administer penalties through an internal administrative procedure. If each violation had to be prosecuted through federal court, the system would be unworkable. The enabling legislation must provide a mechanism for administrative disposition of these cases, including a mechanism for appeals.

(8) The settlement sets maximum fines and penalties for infractions but it does not set any minimum fines or penalties. In Tennessee, the fine for selling this addictive and lethal drug to a child is \$4. If the fines are not substantial, enforcement will be a waste of resources.

Will enforcement actually make any difference in youth's access to tobacco or are we simply going through the motions?

(9) The settlement does not set any minimum frequency at which retailers must be tested. Many communities have adopted quarterly tests. Vermont state law requires quarterly tests since the average retail clerk lasts only 88 days on the job, frequent tests are absolutely necessary to ensure that management is properly training their new employees. Vermont law also mandates that inspections be conducted with a frequency sufficient to maintain merchant compliance above 90%. *The enabling legislation must specify either a minimum frequency of quarterly inspections, or a minimum compliance rate.* Without this, there is no guarantee the law will ever be effectively enforced. Future administrations may decide that they do not like the idea of conducting underage buyer inspections and the frequency of inspections may fall abruptly to zero. The public health benefits of this settlement must be guaranteed just as the benefits to the tobacco industry are.

(10) There is good evidence that teenaged smokers have very little difficulty purchasing tobacco until merchant compliance exceeds 90%. The settlement allows states a full ten years to reach 90% compliance rates. Hence for the first ten years after the settlement goes into effect, it may have no impact what-so-ever on youth smoking. States have already had five years since Congress enacted the so-called Synar amendment in 1992 making federal block grant funds for substance abuse and mental health programs contingent upon effective enforcement of state youth access laws. An additional two or three years at most should be allowed for states to reach effective levels of enforcement.

(11) The penalty to tobacco companies if youth smoking rates exceed the targets set in the settlement is no penalty at all. Tobacco companies would simply have to forgo the profit they would make on these additional teen smokers. Since there is a cap on the amount of penalty they have to pay, the best way for the industry to ensure future profitability will be to drive teen smoking rates up above the point where they reach the cap on the penalty. Any additional teen smokers recruited above the cap would be pure profit. So we should not expect the tobacco companies to try to drive down teen smoking rates. The only financial incentive is for them to drive teen smoking rates as high as possible. To this end, we should expect an effort to sabotage the establishment of an effective and efficient enforcement system. An industry which can quietly slip itself a \$50 billion subsidy should find it simple to slip the word "knowingly" into legislation which is hundreds of pages long. If the tobacco industry succeeds in sabotaging the legislation setting up this enforcement mechanism, it could simultaneously sabotage every state law through the process of federal preemption.

(12) In summary, whether or not this settlement results in a tremendous improvement for public health, or the worst possible disaster will depend on the final language of the enabling legislation.

The CHAIRMAN. Thank you very much.

Dr. DiFranza, one of the things that troubles a lot of us is that every time we watch a movie the most attractive characters or even most of the characters somehow seize the opportunity several times during the movie or television program, especially the movie, to light up a cigarette. Does that bother you?

Dr. DiFRANZA. That bothers me immensely, but with the first amendment I am not sure how we could address that particular problem. All other aspects of advertising are amenable to legislation, but I think when you get into the content of movies and whether the characters smoke, I think it is really difficult.

In the past there has been a clear financial tie between the tobacco industry and these actors. Sylvester Stallone it is known was paid huge sums of money to model smoking in his movies. That certainly could be outlawed. But if a movie director were to spontaneously want to show one of the bad guys smoking, I do not see how we can deal with that.

But I think it has a tremendous influence on the children.

The CHAIRMAN. You do agree with me, though, it does have significant influence?

Dr. DiFRANZA. Absolutely. Many of my older patients—I am a family doctor—tell me they started to smoke because of Lauren Bacall or Humphrey Bogart. Those were the teen idols of their generation. And I am sure that a lot of kids are starting to smoke because of Sylvester Stallone now.

The CHAIRMAN. Mr. Wise, do you have a comment on that?

Mr. WISE. I do not really. I think probably the first amendment analysis is right. There is only so much one can do in terms of curtailing artistic freedom.

I would point out that the terms of our agreement address this issue so far as it could be addressed, I think, by prohibiting payments by anybody in the industry which would have that impact and to try to eliminate any possibility. I think it is also fair to just point out that the industry does not do that now and has agreed not to do it in the future.

The CHAIRMAN. I view myself very subjectively as a zealous guardian of the first amendment, too. But here we are enacting all kinds of restraints on advertisement, penalties of the most severe kind, doing everything we can to provide a disincentive. It seems to me at least we ought to try moral suasion on the movie industry to try and reduce this. It is almost, as some violence is in movies and sex in movies, it seems to me gratuitous rather than any furtherance of the film. But maybe that is more of a complaint than a question.

Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman.

Mr. Wise, in the past when public health advocates and others have criticized the industry for targeting young people in the industry's marketing, the industry has in effect said: No, we are not trying to target young people; what we are just trying to do is get adult smokers to switch their brands; what we are concerned about is the adult market, we are concerned about the chance in a competitive marketplace to get adults to switch.

Well, along comes this Camel club program that the company is running, which strikes me as manifestly zeroing in on young people. Everything about this looks like it targets young people. You know, the promotional material I have read several times; the approach they are using, operating under the radar, trying to be cool, going to concert clubs, going to coffee houses and the like.

What is the companies' rationale for starting a new program like this that so clearly to this Member of the U.S. Senate looks to be targeting young people?

Mr. WISE. Senator, I have not—I did see the article in the newspaper over the weekend and I know the issue you are addressing. I have not had an opportunity to talk to the company about what

the theory is of the campaign or indeed whether the article is correct in all its details.

But I would just point out that, from a first amendment standpoint and from a policy standpoint, the venue for that activity that was described in that article is an adult-only facility. In all of the debate on advertising with respect to these products, in the FDA and now, no one has ever so far as I know suggested that the industry should be prohibited from speaking to consumers who choose to use the product in adult-only facilities.

In fact, the existence, the availability of this venue, in some ways was utilized by the FDA in its analysis of the rationale for why it was justifiable to constrict and constrain communication in other venues because of the availability of adult-only venues where messages between the manufacturers and the consumers of the product could be conveyed.

So that is my take on that issue at the moment. As I pointed out, I am not an expert on the details of that particular ad campaign.

Senator WYDEN. Why is it called "Camel kids"?

Mr. WISE. Like I said, I have not talked to anybody at the company about it.

Senator WYDEN. I guess what—

Mr. WISE. But I would just point out that you have to be—

Senator WYDEN. If you had said you did not know anything about it, I probably would have dropped it. But you said you did not know anything about it and then said, based on everything you know, this is just another one of the company's programs to try to get a foothold in the adult market. You are right, nobody wants to restrict adult choice. But this program has "target kids" all over it. I mean, everything about it, from the promotional material that is put out by a young marketing firm, to the places they go, indicates that this targets young people.

Mr. Chairman, I would like to ask that the company respond in writing with respect to what their rationale is for running a program like this, because I think that this program is totally inconsistent with what the company says it wants to do as part of the settlement. This looks to me like another way to try to circumvent in a very clever kind of way the policies that are being advocated in public.

Mr. WISE. I am sure the company will have no hesitancy in responding to you in writing about whatever question you have about the program. I would point out once again that the description in the article described an ad campaign directed to adult-only facilities, where kids are not present. So it clearly is not a campaign directed toward communicating to people under age.

[The information referred to follows:]

The Camel brand is promoted to adults in a limited number of bars and restaurants in selected cities. It does not and is not intended to promote cigarettes to minors. Quite the contrary, our affiliation with adult venues—age-restricted bars and nightclubs—ensures that we only reach adult smokers with this marketing promotion.

RJR limits this promotion to adults 21 and over to ensure we aren't marketing to minors. We operate the Camel Club promotion in Cleveland in 38 venues. The age requirement for admission in ten of these is 21 and over, while the others admit 18 and older. Ohio state law allows persons aged 18 and older into bars and nightclubs but alcohol can only be served to those 21 years or older. The legal age to purchase tobacco products in Ohio is 18.

In all of the locations, we sample only current adult smokers who are 21 or older. We do not sample nonsmokers. We require a signed certification and a photo ID proving they are over 21 before they can receive a pack of Camels in place of their usual brand.

Mr. Naymik refers several times in the article to the RJR marketing representatives in Cleveland as Camel Club "kids." It is an inaccurate and inappropriate description. We have 13 employees under contract in Cleveland; their ages range from 22 to 32, with an average age of 26.

R.J. Reynolds Tobacco Co. markets its products to the 46 million adults who choose to smoke, over 70 percent of whom do not smoke our brands. Cigarettes are advertised to aid in franchise retention and to convince adult smokers of competitive brands to switch to RJR brands. RJR doesn't want young people to smoke, and that's one reason why age-restricted venues such as bars and nightclubs are appropriate for this promotion.

I thought you'd also like to know that RJR has programs in place that show our commitment to reducing the incidence of youth smoking:

- "Support The Law," implemented in 1992, has been used in more than 50,000 retail outlets across the country. It provided retailers with information to train their employees who sell age-restricted products. Studies indicate that this program when combined with enforcement of age-restriction laws can decrease sales of cigarettes to minors by 50 percent.

- In 1996, RJR joined a coalition of retailers to introduce "We Card," a different program aimed at training store employees on how to identify underage customers attempting to purchase cigarettes. The program is now in approximately 300,000 establishments in the United States.

- "Right Decisions, Right Now" is an RJR-sponsored education program, begun in 1991, that helps school children learn how to say no to peer influences that might lead them to smoke. RDRN offers parents and teachers free educational materials that help them discuss smoking issues with children. Currently 10,000 middle- and junior-high schools are using elements of the program, reaching more than 3.5 million students.

These programs address the key factors why youths begin smoking, which are family influence, peer pressure and access.

Senator WYDEN. Well, I can just tell you that, with the latest studies indicating that high school smoking is way up, high school seniors for example, those are some of the people that are going to be in the coffee houses, for example, where this program is making this new and very aggressive appearance. So we will look forward to seeing the company's rationale.

Let me ask you a question about the international scene, an area that I think you know and the chairman knows I am very interested in. It seems to me that what the settlement does is it codifies a double standard with respect to how marketing is going to go on in the United States relative to the rest of the world?

My reading of the settlement is your company and others, for example, could not slap a Camel sticker on a hot rod or something like that at a sports event, but your company can go out and market in any way, in any shape or form, to target kids overseas. Now, there are parts of the world, for example, where there are actually smoking contests to see how many cigarettes a youngster can smoke simultaneously.

So what we have is a settlement that says: OK, in the United States you cannot sponsor these sports events and the like where young people might go, but if you want to go overseas you can participate in smoking contests in a disgraceful fashion as I have described.

What, if anything, is the company prepared to do to make sure that we do not export the kinds of health problems we have in this country for our children to the kids of Bangkok and Bangladesh and around the Third World?

Mr. WISE. This was a topic that was discussed during our negotiations with the attorneys general and the public health people in the United States and, despite our ambition to address a lot of issues comprehensively, I think at the end of the day we decided that it was really out of place for us to, as a matter of proposing to the U.S. Congress some law to be enacted by the Federal Government, to try to address in that forum how these products are marketed and sold in other countries in the world.

Most, if not all, of the other countries in the world have their own regulatory regimes for these products, they have their own warning systems, and they vary from country to country. The companies are in the business, if they are operating in those countries, of abiding by those rules, which they do.

You know, it is just maybe a relevant fact to point out, because we do tend to look at these things from our own domestic point of view, that—I think I have it right—that the domestic companies in tobacco—maybe it is in the cigarette business—produce only about 16 percent of the world's volume of cigarettes, only 16 percent; and 60 percent, if I have this right, 60 percent of the world's volume is produced by foreign companies that are Government-owned monopolies.

So the competitive landscape out there is complicated and in many places complicated by the fact that the Government is a competitor in the marketplace.

So for all of those reasons and perhaps even simpler ones about exporting our own ideas about how these difficult balances should be reached, we decided that that was really not within the scope of what we were trying to do.

Senator WYDEN. Well, this is very curious, because Christine Gregoire, the attorney general of the State of Washington who participated extensively in those discussions, said that it was her belief that all of the companies would have been willing to support some international restrictions on the marketing of tobacco to kids other than British Tobacco. Now are you telling us that RJR was also reluctant to support any restrictions on marketing to kids?

Mr. WISE. I am not sure that that is what she said. I am familiar with the exchange you had with her, I think at an earlier hearing in the summer, and I think what she was discussing was some initiative with the World Health Organization of some kind or funding for the World Health Organization of some kind. I do not think it was something as concrete as trying to impose restrictions on how these products are marketed in foreign markets.

But the answer to your question is, no, I am not familiar with what she is talking about there.

Senator WYDEN. Let me ask it another way. This summer, in the context of what went on in Florida with respect to the trial there, Steven Goldstone was quoted as saying that "We will warn foreign smokers." It says: "RJR executive"—you cannot see the headline, but it says: "RJR executive: 'We will warn foreign smokers.'"

So I, when asked, said: Sounds encouraging to me. Why do we not use this opportunity to have you tell us how that statement is going to be carried out.

Mr. WISE. I think what he was referring to there—the question was in respect of foreign jurisdictions that have no effective warn-

ing schemes in place, would the company look at the prospect of putting some warnings voluntarily on its packaging in those countries? And I think he said the company would do that, and I think the company is doing that. I think the number of countries where that is the case is quite small, is my understanding.

Senator WYDEN [presiding]. On this point of the double standard that I touched on, where there are restrictions here and it is clearly possible to do what is restricted or barred here overseas, are you troubled by that double standard?

Mr. WISE. You know, I think in measuring how each of these different countries addresses these problems you really have to look at specific questions. No, the fact that different countries approach these public health issues and regulatory issues in different ways does not trouble me particularly.

Senator WYDEN. And you are saying that right now the international marketplace is not such a big factor in the issues that Congress has to deal with with respect to this settlement?

Mr. WISE. No, I do not think that is fair. I think it is fair to, in light of the Chairman's remarks earlier and others, to focus on what can be achieved domestically in light of this consensual arrangement that has arisen as a result of this work, and to put aside for the moment an attempt to try to regulate how foreign markets work.

Senator WYDEN. Right now, under the law the U.S. Trade Representative can treat tobacco products like any other. They can be treated just like a Ritz cracker or Nyquil or anything else, which of course frees up as a matter of law the opportunity for the United States as a formal policy to promote the sales of these products around the world, including to minors.

Would the company support a change in that law?

Mr. WISE. You are out of my depth now in terms of the foreign trade law, but I think my guess would be the answer would be on a case-by-case basis. In each one of these markets, the competitive factors at play in each of these foreign markets would have to be considered. So it is hard to make a generalized statement about it.

Senator WYDEN. Well, Mr. Wise, I can tell you it was only a couple of years ago when the CEO of the company that you are representing today told me under oath that nicotine was not additive, and that makes me pretty skeptical of some of what the industry has put on the table.

I look forward to having you tell us what the rationale is for the new Camel clubs program, that looks like it patently targets young people. I hope that we will hear more about this newspaper clipping where RJR says it will warn foreign smokers.

I have not said that I am opposed to a settlement. It seems to me that there are clear benefits in a settlement. But the Senate and the Congress want some answers to these questions. So we will look forward to having those answers from your client.

Doctor, I did not ask you any questions. I felt that your associates in the public health community addressed many of the issues very well today, and I would just like to give you a chance in closing to add anything further if you wish.

Dr. DiFRANZA. You brought out this point several times, is that if you put certain restrictions on advertising they are going to get

around them, because they have done that in other countries. I think what we are going to see this year in Europe—we have been one vote shy of a complete ban on tobacco advertising throughout the European Economic Community and that one vote was always felt to be England. Now that we have had a change of government there and they have announced that they are going to be banning tobacco advertising in England, we would expect that the next time the EEC gets together they are going to ban advertising throughout Europe.

The Canadian Government is rewriting their ban on advertising, and we have seen bans in New Zealand and Australia. I do not see any reason why we should not go with a complete ban in the United States as well. There are many democratic countries with freedom of speech who have bans on all tobacco advertising.

Another possibility would be to limit the amount of money they can spend to the amount of money we can spend. One problem with all of our efforts in the past to encourage kids not to smoke, we were out-spent about a thousand to one. So if they are going to give us \$500 million a year to spend on counter-advertising, perhaps the industry should be limited to \$500 million to spend promoting their products. That would be another possibility.

Senator WYDEN. It just seems to me—and we will, as I say, await Mr. Wise's client's response—that there are a number of practical steps that can be taken that are consistent with our principles of a free market, and I hope that we will be able to include those in the settlement and that the special focus will be on these growth markets.

You mentioned Europe. It is very clear the western industrialized nations are moving to many of the policies that our country is. I read an analysis recently that indicated that for every smoker who stops in the United States two smokers start in China. So this ballgame is about Asia and it is about the Third World. I think that is why there have been such efforts by many of the companies to restrict any limitations on the global market.

I just think that we have a moral obligation as we protect kids in our country to also take steps to keep young people from getting sick around the world.

Gentlemen, we thank you and, by order of Chairman McCain, the committee is adjourned.

[Whereupon, at 12:17 p.m., the committee was adjourned.]

APPENDIX

PREPARED STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

Although there are considerable differences over many issues regarding the tobacco industry, there is one issue where there should be no disagreement—the elimination of smoking by children.

According to the Food and Drug Administration (FDA), each day over 3,000 young people in the United States become regular smokers. It is estimated that nearly one-third will die from smoking-related diseases.

The data on the age at which children begin smoking is startling. According to the Kessler-Koop Advisory Committee on Tobacco Policy and Public Health, the average age at which children begin experimenting with smoking is 12 and one-half years old. These kids are barely out of elementary school before they are experimenting with cigarettes. Additional studies by the U.S. Surgeon General show that 3.1 million children between the ages of 12 and 18 are likely to become regular smokers.

Yes, tobacco is a legal product, but it is not intended for kids. Everyone, including my good friend Senator Ford, agrees with that. He himself has sponsored legislation designed to prohibit appeals to kids.

What are the causes of this problem? Some say it is advertising, while others claim it is the parent's responsibility. I am not certain what the main cause or explanation is, but it is our goal to get to the bottom of it, so as to construct the appropriate policies to deal with this matter.

Today's hearing is the first in a series of hearings the Committee has scheduled to look into the details of the tobacco settlement. The witnesses that will testify today have considerable expertise on the subject of tobacco use by kids. I am sure they will have helpful suggestions on how to confront this issue. I look forward to their testimony.

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